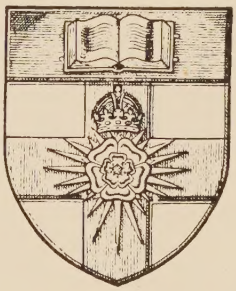
THIS BOOK
MUST NOT BE REMOVED
FROM THE LIBRARY

UNIVERSITY OF LONDON LIBRARY

REFERENCE ONLY

B 46.4
Mx. North.



UNIVERSITY OF LONDON
LIBRARY

Digitized by the Internet Archive
in 2026

https://archive.org/details/law-reports-house-of-lords_1916_1

THE

INCORPORATED COUNCIL OF LAW REPORTING

FOR

ENGLAND AND WALES.

Members of the Council.

Chairman—Sir F. A. Bosanquet, K.C.
Vice-Chairman—P. Ogden Lawrence, Esq., K.C.

EX-OFFICIO MEMBERS.

Right Hon. Sir F. E. Smith, M.P. . . Attorney-General.
Right Hon. Sir George Cave, M.P. . . Solicitor-General.
Richard S. Taylor, Esq., President of the Law Society.

ELECTED MEMBERS.

P. Ogden Lawrence, Esq., K.C. W. R. Sheldon, Esq.	Lincoln's Inn.
Sir F. A. Bosanquet, K.C. H. F. Dickens, Esq., K.C.	Inner Temple.
C. C. Scott, Esq., K.C. W. F. Hamilton, Esq., K.C.	Middle Temple.
J. C. Lewis Coward, Esq., K.C. Right Hon. H. E. Duke, K.C., M.P.	Gray's Inn.
T. R. Hughes, Esq., K.C., of Lincoln's Inn. E. W. Hansell, Esq., of the Inner Temple.	Appointed by the Council of Law Reporting on the nomination of the General Council of the Bar.
W. Melmoth Walters, Esq. (Firm—Messrs. Walters & Co.). J. W. Budd, Esq. (Firm—Messrs. Budd, Johnson & Jecks).	The Law Society.

Secretary—P. Noble Fawcett, Esq., 10, Old Square, Lincoln's Inn, London, W.C.

1916.

THE

LAW REPORTS

OF THE INCORPORATED COUNCIL OF LAW REPORTING.

HOUSE OF LORDS,

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

AND

PEERAGE CASES.

EDITOR—RIGHT HON. SIR FREDERICK POLLOCK, BART., *Barrister-at-Law.*

REPORTERS.

House of Lords	H. B. HEMMING,	*Barrister-at-Law.*
Privy Council	ARTHUR M. TALBOT,	*Barrister-at-Law.*

1916.—VOL. I.

LONDON:

Printed for the Council of Law Reporting

BY BRADBURY, AGNEW, & CO. LD., OF 10, BOUVERIE STREET, E.C.,

And Published

BY THE COUNCIL AT 10, OLD SQUARE, LINCOLN'S INN, W.C.

BIBL. LONDIN UNIV.

BIBL.
LONDIN.
UNIV.

JUDGES AND LAW OFFICERS.

MEMORANDA.

1915.

Dec. 22. THE RIGHT HONOURABLE SIR JOSHUA STRANGE WILLIAMS, *late Senior Puisne Judge of the Supreme Court of New Zealand, died at Hove, Sussex, at the age of* 78.

1916.

Jan. 27. SIR MATTHEW INGLE JOYCE, *late a Judge of the Chancery Division, and* SIR LAWRENCE HUGH JENKINS, K.C.I.E., *formerly a Chief Justice of the High Court in India, were sworn of the Privy Council and took their places accordingly.*

Jan. 28. THE RIGHT HONOURABLE JOHN CHARLES, BARON MERSEY, *formerly President of the Probate, Divorce, and Admiralty Division, was created a Viscount by the style of Viscount Mersey, of Toxteth in the County Palatine of Lancaster.*

Jan. 31. THE RIGHT HONOURABLE SIR LAWRENCE HUGH JENKINS, K.C.I.E., *formerly a Chief Justice of the High Court in India, was appointed a member of the Judicial Committee under the Appellate Jurisdiction Act,* 1908, *s.* 2.

ERRATA.

Page	*Line*	*For*	*Read*
126	footnote (2)	[1914] P.	[1915] P.
128	,, (1)		
129	,, (3)		
491	,, (8)	2 Dods. 430.	2 Dods. 403.

The Mode of Citation of the Volumes of the *Law Reports* commencing January 1, 1916, will be as follows:—

In the First Series,
[1916] 1 Ch. [1916] 2 Ch.

In the Second Series,
[1916] 1 K. B. [1916] 2 K. B. [1916] P.

In the Third Series,
[1916] 1 A. C. [1916] 2 A. C.

The Scottish Law Reports are cited as follows:—

Shaw, or, First Series Court of Session Cases	.	.	by	S.
Dunlop, or, Second Series	,,	,,	,,	.	.	,,	D.
Macpherson, or, Third Series	,,	,,	.	.	,,	M.
Rettie, or, Fourth Series	,,	,,	,,	.	.	,,	R.
Fraser, or, Fifth Series	,,	,,	,,	.	.	,,	F.
New Series	,,	,,	,,	.	.	,,	1907 S. C.
Scottish Law Reporter	,,	,,	,,	.	.	,,	S. L. R.
Morison's Dictionary, or, the Collection of Old Cases	.	,,	Mor. Dict.

A TABLE

OF THE

NAMES OF THE CASES REPORTED

IN THIS VOLUME.

A.

	PAGE
Aktieselskabet Fjord of Kristiania, Beechgrove Steamship Company *v.* – H. L. (Sc.)	364
Aramayo, Kensington Income Tax Commissioners *v.* H. L. (E.)	215
Attorney-General for Alberta, Attorney-General for Canada *v.* – – – – P. C.	588
Attorney-General for Canada *v.* Attorney-General for Alberta P. C.	588
Attorney-General for Ontario *v.* P. C.	598
Attorney-General for Ontario *v.* Attorney-General for Canada P. C.	598

B.

PAGE

Bank of Australasia *v.* Sydney Municipal Council – P. C. 181
Barnsley British Co-operative Society *v.* Worsborough Urban Council – H. L. (E.) 291
Beal, Horlock *v.* – H. L. (E.) 486
Beechgrove Steamship Company *v.* Aktieselskabet Fjord of Kristiania – – H. L. (Sc.) 364
Board of Agriculture for Scotland *v.* Plummer – H. L. (Sc.) 675
Bonanza Creek Gold Mining Company *v.* Rex – P. C. 566
Bradford Corporation *v.* Myers H. L. (E.) 242
British and Foreign Marine Insurance Company *v.* Sanday & Co. – – H. L. (E.) 650
British Columbia Electric Railway Company *v.* Loach – P. C. 719
Brokers (Produce) Company *v.* Olympia Oil and Cake Company – – H. L. (E.) 314

C.

Canadian Northern Ontario Railway Company, Holditch *v.* P. C. 536
Canton (Union Insurance Society of) *v.* Wills (George) & Co. P. C. 281
Central Trust and Safe Deposit Company *v.* Snider – P. C. 266
Chertsey Assessment Committee, Metropolitan Water Board *v.* H. L. (E.) 337
Churm *v.* Dalton Main Collieries Company – H. L. (E.) 612
Collieries (Dalton Main) Company, Churm *v.* – H. L. (E.) 612
Cook *v.* Deeks – – P. C. 554
Co-operative (Barnsley British) Society *v.* Worsborough Urban Council – – H. L. (E.) 291
Copthall Stores *v.* Willoughby's Consolidated Company – P. C. 167

D.

Dalton Main Collieries Company, Churm *v.* – H. L. (E.) 612
Deeks, Cook *v.* – – P. C. 554
Drinkle, Steedman *v.* – P. C. 275
Dysart (Earl), Hammerton *v.* H. L. (E.) 57

F.

Fjord (Aktieselskabet) of Kristiania, Beechgrove Steamship Company *v.* – H. L. (Sc.) 364
Fox *v.* Jolly – H. L. (E.) 1
—— (Samuel) & Co., Herbert *v.* H. L. (E.) 405

G.

Gold Mining (Bonanza Creek) Company *v.* Rex – P. C. 566
Great Western and Metropolitan Railway Companies *v.* Hammersmith Assessment Committee – – H. L. (E.) 23
———————— *v.* Kensington Assessment Committee H. L. (E.) 23
Great Western Railway Company, United States Steel Products Company *v.* H. L. (E.) 189

H.

Hammersmith Assessment Committee, Great Western and Metropolitan Railway Companies *v.* – – H. L. (E.) 23
Hammerton *v.* Dysart (Earl) H. L. (E.) 57
Hazleton, Hollinshead *v.* H. L. (I.) 428
Herbert *v.* Fox (Samuel) & Co. H. L. (E.) 405
Herbert Morris, Limited *v.* Saxelby – H. L. (E.) 688
Holditch *v.* Canadian Northern Ontario Railway Company P. C. 536
Hollinshead *v.* Hazleton H. L. (I.) 428
Horlock *v.* Beal – H. L. (E.) 486
Hutchison *v.* M'Kinnon H. L. (Sc.) 471

I.

Insurance (Union) Society of Canton *v.* Wills (George) & Co. P. C. 281

J.

PAGE

Jamal *v.* Moolla Dawood, Sons & Co. – – – P. C. 175
Jolly, Fox *v.* – H. L. (E.) 1

K.

Kensington Assessment Committee, Great Western and Metropolitan Railway Companies *v.* – H. L. (E.) 23
Kensington Income Tax Commissioners *v.* Aramayo H. L. (E.) 215

L.

Loach, British Columbia Electric Railway Company *v.* – P. C. 719

M.

M'Kinnon, Hutchison *v.* H. L. (E.) 471
Mamode Hadee, Said & Co. *v.* P. C. 545
Marine Insurance (British and Foreign) Company *v.* Sanday & Co. – – H. L. (E.) 650
Marten, Stott (Baltic) Steamers *v.* – – H. L. (E.) 304
Metropolitan Water Board *v.* Chertsey Assessment Committee – – H. L. (E.) 337
Meyappa Chetty *v.* Supramanian Chetty – – – P. C. 603
Moolla Dawood, Sons & Co., Jamal *v.* – – P. C. 175
Morris (Herbert), Limited *v.* Saxelby – – H. L. (E.) 688
Myers, Bradford Corporation *v.* H. L. (E.) 242

N.

Niagara Falls (Ontario Power Company of) *v.* Stamford Corporation – – – P. C. 529

O.

Odessa, The – – – P. C. 145
Oil and Cake (Olympia) Company, Produce Brokers Company *v.* – H. L. (E.) 314
Olympia Oil and Cake Company, Produce Brokers Company *v.* H. L. (E.) 314
Ontario Power Company of Niagara Falls *v.* Stamford Corporation – – P. C. 529

P.

Plummer, Board of Agriculture for Scotland *v.* – H. L. (Sc.) 675
Proctor, Serbino (Owners of S.S.) *v.* – – H. L. (E.) 464
Produce Brokers Company *v.* Olympia Oil and Cake Company – – – H. L. (E.) 314

R.

Rex, Bonanza Creek Gold Mining Company *v.* – – P. C. 566
Roumanian, The – P. C. 124

S.

Said & Co. *v.* Mamode Hadee P. C. 545
Sanday & Co., British and Foreign Marine Insurance Company *v.* H. L. (E.) 650
Saxelby, Herbert Morris, Limited, *v.* – – – H. L. (E.) 688
Serbino (Owners of S.S.) *v.* Proctor – – H. L. (E.) 464
Snider, Central Trust and Safe Deposit Company *v.* – P. C. 266
Stamford Corporation, Ontario Power Company of Niagara Falls *v.* – – – P. C. 529
Steamship (Beechgrove) Company *v.* Aktieselskabet Fjord of Kristiania – – H. L. (Sc.) 364
Steedman *v.* Drinkle – P. C. 275
Steel Products (United States) Company *v.* Great Western Railway Company – H. L. (E.) 189
Stott (Baltic) Steamers *v.* Marten H. L. (E.) 304
Supramanian Chetty, Meyappa Chetty *v.* – – P. C. 603
Sydney Municipal Council, Bank of Australasia *v.* – P. C. 181

T.

PAGE

Trust and Safe Deposit (Central) Company *v.* Snider – P. C. 266

U.

Union Insurance Society of Canton *v.* Wills (George) & Co. P. C. 281

United States Steel Products Company *v.* Great Western Railway Company – H. L. (E.) 189

W.

PAGE

Water (Metropolitan) Board *v.* Chertsey Assessment Committee – – H. L. (E.) 337

Weber, Ex parte – H. L. (E.) 421

Willoughby's Consolidated Company, Copthall Stores *v.* – P. C. 167

Wills (George) & Co., Union Insurance Society of Canton *v.* P. C. 281

Woolston, The – – P. C. 145

Worsborough Urban Council, Barnsley British Co-operative Society *v.* – – H. L. (E.) 291

TABLE OF CASES CITED.

A.

		PAGE
Abo, The	Spinks, 42; 2 Eng. P. C. 285	147
Aina No. 1, The	Spinks, 8; 2 Eng. P. C. 268	147
Aldworth, The	Unreported	128
Ambler & Sons *v.* Bradford Corporation	[1902] 2 Ch. 585	244
Amy Warwick, The	2 Sprague, 150, 160	148
Andersen *v.* Marten	[1908] A. C. 334	490
Anderson *v.* Wallis	2 M. & S. 240	654
Angel *v.* Merchants' Marine Insurance Company	[1903] 1 K. B. 811	655
Anguish *v.* Ebden	Cited in Gunning on Tolls, p. 110	63
Annapolis, The	Lush. 295	370
Appleby *v.* Myers	L. R. 2 C. P. 651	496
Ariel, The	11 Moo. P. C. 119; 2 Eng. P. C. 600	147
Ashbury Railway Carriage and Iron Company *v.* Riche	L. R. 7 H. L. 653	566
Ashby *v.* White	2 Ld. Raym. 938	70
Attorney-General *v.* Great Eastern Railway Company	5 App. Cas. 473	572
——— *v.* Horner	14 Q. B. D. 245	61
——— *v.* Margate Pier and Harbour Company	[1900] 1 Ch. 749	247
——— *v.* Richards	2 Anst. 603	63
Attorney-General for Canada *v.* Attorney-General for Alberta	[1916] 1 A. C. 588	598
Attorney-General for the Commonwealth of Australia *v.* Adelaide Steamship Company	[1913] A. C. 781	694
——— *v.* Colonial Sugar Refining Company	[1914] A. C. 237	579
Attorney-General for Manitoba *v.* Manitoba Licence Holders Association	[1902] A. C. 73	592
Attorney-General for Ontario *v.* Attorney-General for the Dominion	[1896] A. C. 348	590
——— *v.* Mercer	8 App. Cas. 767	593
Austin Friars Steam Shipping Company *v.* Strack	[1905] 2 K. B. 315	490

B.

Badische Anilin und Soda Fabrik *v.* Schott, Segner & Co.	[1892] 3 Ch. 447	693
Baily *v.* De Crespigny	L. R. 4 Q. B. 180	490
Bank of Toronto *v.* Lambe	12 App. Cas. 575	591
Barker *v.* Blakes	9 East, 283	654
Barnard *v.* Faber	[1893] 1 K. B. 340	284
Barnes *v.* Nunnery Colliery Company	[1912] A. C. 44	405, 456
Battle, The	6 Wall. 498	156
Beale *v.* Thompson	4 East, 546; 1 Dow, 299	486, 489
Beckham *v.* Drake	2 H. L. C. 579	431
Bedwell's Settlement, In re	11 W. R. 161	268
Behn *v.* Burness	3 B. & S. 751	284
Belvidere, The	1 Dods. 353; 2 Eng. P. C. 183	147
Berlin Johannes, The	Rothery, 125	127
Billericay Rural Council *v.* Poplar Union	[1911] 2 K. B. 801	295
Birely and Toronto, Hamilton and Buffalo Railway Company, In re	28 Ont. R. 468	540
Blacketer *v.* Gillett	9 C. B. 26	62
Blair & Co. *v.* Chilton	[1915] W. N. 203; 8 B. W. C. C. 324	418
Blissett *v.* Hart	Willes, 508	67
Bonanza Creek Gold Mining Company *v.* Rex	[1916] 1 A. C. 566	595, 598
Bostock *v.* Ramsey Urban Council	[1900] 1 Q. B. 357; [1900] 2 Q. B. 616	244
Bowen *v.* Canadian Southern Railway	14 Ont. App. R. 1	540
Brace *v.* Calder	[1895] 2 Q. B. 253	176
Bradburn *v.* Great Western Railway Company	L. R. 10 Ex. 1	180
Brenner *v.* Toronto Railway Company	13 Ont. L. R. 423; 15 Ont. L. R. 195; 43 Can. S. C. R. 540	719, 725
Brice *v.* Edward Lloyd, Limited	[1909] 2 K. B. 804	407
Brindley, In re	4 Morrell, 104	431
Bristol and West of England Bank *v.* Midland Railway Company	[1891] 2 Q. B. 653	147
Bristow *v.* Towers	6 T. R. 35	590
Brown *v.* United States (The)	8 Cranch, 110	127
——— and Burton *v.* Franklyn	Carth. 474	138
Buccleuch (Duke) *v.* Metropolitan Board of Works	L. R. 5 H. L. 418	319, 539
Bunbury *v.* Fuller	9 Ex. 111	320
Burland *v.* Earle	[1902] A. C. 83	555

C.

Caine *v.* Palace Steam Shipping Company	[1907] 1 K. B. 673; [1907] A. C. 386	490
Canadian Pacific Railway Company *v.* Fréchette	[1915] A. C. 871	721
——— *v.* Ottawa Fire Insurance Company	39 Can. S. C. R. 405	570
——— *v.* Winnipeg (City of)	30 Can. S. C. R. 558	530
Canadian Southern Railway Company *v.* Gebhard	109 U. S. 527	572

		PAGE
Carlos F. Roses, The	177 U. S. 655	148
Carpue *v.* London and Brighton Railway Company	5 Q. B. 747	244
Cathcart *v.* Blackwood	Cited Cooke's Bankrupt Laws, 8th ed., p. 318	433
Cedars Rapids Manufacturing and Power Company *v.* Lacoste	[1914] A. C. 569	344
Chamberlain and Hookham *v.* Bradford Corporation	83 L. T. 518	244
Chandler *v.* Greaves	2 H. Bl. 606, n.	490
Charles River Bridge Case	11 Peters (36 U. S.), 618	104
Charlotte, The	6 C. Rob. 386, n.; 1 Eng. P. C. 585, n..	127
Charlton, The	8 Asp. M. L. C. 29	365
Chilton *v.* Blair & Co.	[1914] W. N. 290; [1915] W. N. 203; 7 B. W. C. C. 607; 8 B. W. C. C. 324	407
Churchman *v.* Tunstal	Hardres, 162	61
Citizens Insurance Company of Canada *v.* Parsons	7 App. Cas. 96.	591
Clemens Horst Company *v.* Biddell Brothers	[1912] A. C. 18	147
Clinton's Case	Pike's Ed. of Year Book, 12 & 13 Edw. 3, pp. 208—210	90
Clyde Navigation Company *v.* Barclay	1 App. Cas. 790	370
Cokelon *v.* Kentra (Owners of Ship)	5 B. W. C. C. 658	473
Colls *v.* Home and Colonial Stores	[1904] A. C. 179	69
Cologan *v.* London Assurance Company	5 M. & S. 447	654
Colonial Building and Investment Association *v.* Attorney-General of Quebec	9 App. Cas. 157	570
Colonial Government *v.* Brady	17 Sup. Ct. 404	170
Colquhoun *v.* Brooks	14 App. Cas. 493	223
——— *v.* Heddon	24 Q. B. D. 491	572
Comanche County *v.* Lewis	133 U. S. 198	569
Commissioners for Special Purposes of Income Tax	[1891] A. C. 531	432
Conqueror, The	2 C. Rob. 303	129
Constantia Harlessen, The	Edw. 232	147
Cooper *v.* Reg.	14 Ch. D. 311	447
Cork Corporation *v.* Shinklin	Sm. & B. 395	71
Cortelyou *v.* Lansing	2 Cairnes' Cases in Error, 199	158
Cory *v.* Yarmouth and Norwich Railway Company	3 Hare, 593	101
Cory & Sons *v.* Burr	8 App. Cas. 393	656
Cowes Urban Council *v.* Southampton, Isle of Wight and South of England Royal Mail Steam Packet Company	[1905] 2 K. B. 287	63
Cowper Essex *v.* Acton Local Board	14 App. Cas. 153	539
Craske *v.* Wigan	[1909] 2 K. B. 635	473
Crowe *v.* Price	22 Q. B. D. 429	431
Cullen *v.* Butler	5 M. & S. 461	311

D.

Dagenham (Thames) Dock Company, In re	L. R. 8 Ch. 1022	277
Dahl *v.* Nelson, Donkin & Co.	6 App. Cas. 38	499

		PAGE
Davies and James Bay Railway Company, In re	28 Ont. L. R. 544	539
—— *v.* National Fire and Marine Insurance Company of New Zealand	[1891] A. C. 485	284
Delamainer *v.* Winteringham	4 Camp. 186	489
Deshais, In the Goods of	34 L. J. (P.) 58	606
Devlin and Hamilton and Lake Erie Railway Company, In re	40 Upper Canada Q. B. 160	538
Dibden *v.* Skirrow	[1908] 1 Ch. 41	102
Dobie *v.* Temporalities Board	7 App. Cas. 136	570
Dominion Cotton Mills Company *v.* Amyot	[1912] A. C. 546	556
Donald *v.* Suckling	L. R. 1 Q. B. 585	159
Dorchester Corporation *v.* Ensor	L. R. 4 Ex. 335	71
Doust *v.* Mathews	Cited 12 C. B. (N.S.) 40	62
Dunn *v.* Reg.	[1896] 1 Q. B. 116	442

E.

Eads *v.* Williams	24 L. J. (Ch.) 531	319
East Asiatic Company *v.* S.S. Tronto Company	31 Times L. R. 543	655
East London Railway Joint Committee *v.* Greenwich Union Assessment Committee	[1913] 1 K. B. 612	24
Eastes *v.* Russ	[1914] 1 Ch. 468	695
Edinburgh City *v.* George Heriot's Hospital	7 S. L. T. 371	262
Edwards *v.* St. Mary, Islington (Vestry)	22 Q. B. D. 338	244
Elderslie Steamship Company *v.* Borthwick	[1905] A. C. 93	649
Elizabeth, The	2 Dods. 403	491
Elston *v.* Rose	L. R. 4 Q. B. 4	225
Embiricos *v.* Sydney Reid & Co.	[1914] 3 K. B. 45	489
Emden *v.* Carte	17 Ch. D. 768	431
Esposito *v.* Bowden	7 E. & B. 763	489, 655
Eversfield *v.* Newman	4 C. B. (N.S.) 418	222

F.

Farrell *v.* Richmond and Danville R. R. Company	11 Am. St. Rep. 760; 102 N. C. 390	192
Fielding *v.* Morley Corporation	[1899] 1 Ch. 1; [1900] A. C. 133	244
Finlay *v.* Liverpool and Great Western Steamship Company	23 L. T. 251	653
Fitzsimons *v.* Fitzsimons	28 Beav. 417	268
Flarty *v.* Odlum	3 T. R. 681	433
Fletcher *v.* Nokes	[1897] 1 Ch. 271	7
Frances, The	8 Cranch, 418	147
Freemoult *v.* Dedire	1 P. Wms. 428	271
Friends, The	4 C. Rob. 143	491

G.

Geipel *v.* Smith	L. R. 7 Q. B. 404	489
Geirionydd Rural Council *v.* Green	[1909] 2 K. B. 845	295
General Estates Company *v.* Beaver	[1913] 2 K. B. 433; [1914] 2 K. B. 918	63

		PAGE
General Steam Navigation Company *v.* British and Colonial Steam Navigation Company	L. R. 3 Ex. 330; L. R. 1 Ex. 238	365, 368
Giles *v.* Groves	12 Q. B. 721	62
Goolam Hossen, Mamode & Co. *v.* Chetty & Co.	7 Mauritius Decisions, 99	547
Goss *v.* Withers	2 Burr. 683	491
Gould *v.* Stuart	[1896] A. C. 575	442
Governor Raffles, The	2 Dods. 14	491
Grand Trunk Pacific Railway Company *v.* Fort William Land Investment Company	[1912] A. C. 224	539
Graydon, In re	[1896] 1 Q. B. 417	431
Great Central Railway Company *v.* Banbury Union Assessment Committee	[1906] 1 K. B. 597; [1907] 1 K. B. 717; [1909] A. C. 78	24, 31
Great Eastern Railway Company *v.* Goldsmid	9 App. Cas. 927	71
Greenway *v.* Hurd	4 T. R. 553	258

H.

Hadkinson *v.* Robinson	3 Bos. & P. 388	653
Hadley *v.* Clarke	8 T. R. 259	486
Hall *v.* Hayman	[1912] 2 K. B. 5	655
Halley, The	L. R. 2 P. C. 193	379
Halliday *v.* Phillips	23 Q. B. D. 48; [1891] A. C. 228	63
Hammersmith Railway Company *v.* Brand	L. R. 4 H. L. 171	538, 685
Hampton, The	5 Wall. 372	156
Hankow, The	4 P. D. 197	392
Harman *v.* Kingston	3 Camp. 152	284
Harris, In re	[1909] 2 Ch. 206	268
Harrop *v.* Hirst	L. R. 4 Ex. 43	71
——— *v.* Ossett Corporation	[1898] 1 Ch. 525	250
Haynes *v.* Doman	[1899] 2 Ch. 15	694
Heidelberg Municipality *v.* Uys	15 Sup. Ct. 156	170
Hemsworth Rural Council *v.* Micklethwaite	2 L. G. R. 1084	295
Henry *v.* Henry	Ir. R. 6 Eq. 286	268
Higginson *v.* Blackwell Colliery Company	84 L. J. (K. B.) 1189	617
Hill *v.* Thomas	[1893] 2 Q. B. 333	295
Hitchcock *v.* Coker	6 Ad. & E. 438	692
Hodge *v.* Reg.	9 App. Cas. 117	592
Hoffnung (No. 2), The	6 C. Rob. 383; 1 Eng. P. C. 583	126
Home Marine Insurance Company *v.* Smith	[1898] 2 Q. B. 351	285
Homer *v.* Ashford	3 Bing. 322	692
Hooley *v.* Butterley Company	84 L. J. (K. B.) 1969	617
Hoop, The	1 C. Rob. 196	507, 655
Hopkins *v.* Great Northern Railway Company	2 Q. B. D. 224	62
Horsey Estate *v.* Steiger	[1899] 2 Q. B. 79	7
Horton *v.* Colwyn Bay and Colwyn Urban Council	[1908] 1 K. B. 327	539

		PAGE
Howard *v.* Miller	[1915] A. C. 318	268
Howell *v.* Coupland	1 Q. B. D. 258	497
Huggins, In re	21 Ch. D. 85	431
Humfrey *v.* Dale	7 E. & B. 266	319
Hutcheson & Co. *v.* Eaton & Son	13 Q. B. D. 861	314
Hutton, In re	14 Q. B. D. 301	431
——— *v.* Warren	1 M. & W. 466	327
Huzzey *v.* Field	2 C. M. & R. 432	63

I.

Ida, The	Spinks, 26; 2 Eng. P. C. 285	147
Imperial Marine Insurance Company *v.* Fire Insurance Corporation	4 C. P. D. 166	284
Inchmaree Case	12 App. Cas. 484	306
Inman Steamship Company *v.* Bischoff	7 App. Cas. 670	656
Islington Market Bill	3 Cl. & F. 513	72

J.

Jackson *v.* Union Marine Insurance Company	L. R. 8 C. P. 572; L. R. 10 C. P. 125	489
Jacobus Marler Estates *v.* Marler	House of Lords, April 14, 1913	564
Janson *v.* Fincham	9 Juta, 289	170
Jebsen *v.* East and West India Dock Company	L. R. 10 C. P. 300	180
John Deere Plow Company *v.* Wharton	[1915] A. C. 330	591, 598
Judd *v.* Fourie	2 Buchanan, 41	170
Juno, The	112 L. T. 471	128

K.

Kacianoff *v.* China Traders Insurance Company	[1913] 3 K. B. 407; [1914] 3 K. B. 1121	653
Kerr *v.* Ayr Steam Shipping Company	[1915] A. C. 217	466
Kilmer *v.* British Columbia Orchard Lands	[1913] A. C. 319	275
Kinloch *v.* Secretary of State for India	7 App. Cas. 619	432
Kitchenham *v.* Johannesburg (Owners of S.S.)	[1911] 1 K. B. 523	473
Knill *v.* Dumergue	[1911] 2 Ch. 199	431
Knox *v.* Gye	L. R. 5 H. L. 656	606
Krell *v.* Henry	[1903] 2 K. B. 740	497

L.

La Compagnie Hydraulique de St. François *v.* Continental Heat and Light Company	[1909] A. C. 194	570
Lands Allotment Company, In re	[1894] 1 Ch. 617	556
Lawes, In re	20 Ch. D. 81	269
Leather Cloth Company *v.* Lorsont	L. R. 9 Eq. 345	700
Le Caux *v.* Eden	2 Doug. 594	126
Lee *v.* Stag Line	2 B. W. C. C. 660	473
Leng (Sir W. C.) & Co. *v.* Andrews	[1909] 1 Ch. 763	694
Letton *v.* Goodden	L. R. 2 Eq. 123	62

		PAGE
Lidderdale *v.* Montrose (Duke)	4 T. R. 248	441
Lindo *v.* Rodney	2 Doug. 612, n.	126
Lion, The	L. R. 2 P. C. 525	369
Liverpool Corporation *v.* Llanfyllin Assessment Committee	78 L. T. 835; [1899] 2 Q. B. 14	344
Lock *v.* Pearce	[1893] 2 Ch. 271	7
Logan *v.* Fairlie	1 My. & Cr. 59	607
London County Council *v.* Attorney-General	[1902] A. C. 165	572
——— *v.* Erith Overseers	[1893] A. C. 562	343
Londonderry Bridge Commissioners *v.* M'Keever	27 L. R. Ir. 464	86
Lowe *v.* Farlie	2 Madd. 101	607
Lubbock *v.* Rowcroft	5 Esp. 50	653
Lucas and Chesterfield Gas and Water Board, In re	[1909] 1 K. B. 16	345
——— *v.* Harris	18 Q. B. D. 127	431
Lucey *v.* Ingram	6 M. & W. 302	369
Lupton, In re	[1912] 1 K. B. 107	431
Lyles *v.* Southend-on-Sea Corporation	[1905] 2 K. B. 1	244
Lysons *v.* Andrew Knowles & Sons	[1901] A. C. 79	624

M.

McAlpine and Lake Erie and Detroit Railway Company, In re	3 Ont. L. R. 230	539
Macbeth & Co. *v.* Marine Insurance Company	[1908] A. C. 144	655
M'Cowan *v.* Baine	[1891] A. C. 401	306
Mackenzie *v.* Whitworth	1 Ex. D. 36	654
McPhie *v.* Greenock Corporation	7 F. 246	262
Maddison *v.* Chapman	1 J. & H. 470	268
Mallan *v.* May	11 M. & W. 653	692
Maria, The	1 W. Rob. 95	379
Marianna, The	6 C. Rob. 24; 1 Eng. P. C. 518	147
Marie Anne, The	Rothery, 126	127
Maritime Bank of Canada (Liquidators of) *v.* Receiver-General of New Brunswick	[1892] A. C. 437	570
Marshall *v.* Wild Rose (Owners of S.S.)	[1910] A. C. 486	466
Mary, The	9 Cranch, 126	156
Mashona, The	10 Cape Times L. R. 163	129
Mason *v.* Provident Clothing and Supply Company	[1913] A C. 724	694
Matthews *v.* Peache	5 E. & B. 546	62
——— *v.* Usher	68 L. J. (Q. B.) 988; 81 L. T. 542	7
Maughan *v.* Edinburgh and District Water Trust	13 R. 1046	225
Mauritius Tea Estate Company *v.* Conservator of Mortgages	(1906) Mauritius Reports, 1	547
Mawdsley *v.* West Leigh Colliery Company	5 B. W. C. C. 80	407
Maxim Nordenfelt Guns and Ammunition Company *v.* Nordenfelt	[1893] 1 Ch. 630; [1894] A. C. 535	693
Mellor *v.* Spateman	1 Wms. Saund. (1871 ed.), 612	71

		PAGE
Melville *v.* De Wolf	4 E. & B. 844	489
Menier *v.* Hooper's Telegraph Works	L. R. 9 Ch. 350	565
Metzner *v.* Bolton	9 Ex. 518	324
Meyer *v.* Dresser	16 C. B. (N.S.) 646	324
Midland Railway Company *v.* Withington Local Board	11 Q. B. D. 788	244
Milford Docks Company *v.* Milford Haven Urban Council	65 J. P. 483	244
Miller *v* Law Accident Insurance Company	[1902] 2 K. B. 694; [1903] 1 K. B. 712	653
——— *v.* Thurgood	33 Beav. 496	268
Mills *v.* Dunham	[1891] 1 Ch. 576	693
Miramichi, The	[1915] P. 71	126
Mirams, In re	[1891] 1 Q. B. 594	431
Mitchel *v.* Reynolds	1 P. Wms. 181; 1 Sm. L. C. (12th ed.) 458	692
Montreal City *v.* Montreal Street Railway	[1912] A. C. 333	592
Moore *v.* Naval Colliery Company	5 B. W. C. C. 87	415
Mores *v.* Conham	Owen, 123	159
Moss *v.* Smith	9 C. B. 94	499
Murray *v.* East India Company	5 B. & Al. 204	606
Musgrave *v.* Pulido	5 App. Cas. 102	585

N.

New River Company *v.* Hertford Union	[1902] 2 K. B. 597	338
New South Wales Taxation Commissioners *v.* Adams	[1912] A. C. 384	224
New York Life Insurance Company *v.* Cravens	178 U. S. 389	593
——— *v.* Styles	14 App. Cas. 381	593
Newton *v.* Cubitt	12 C. B. (N.S.) 32; 13 C. B. (N.S.) 864	57, 64
Nickoll *v.* Ashton	[1901] 2 K. B. 126	513
Nigretia, The	2 Russ. & Jap. Prize Cases, 208	150
Nordenfelt *v.* Maxim Nordenfelt Company	[1894] A. C. 535	706
Normandy *v.* Ind, Coope & Co.	[1908] 1 Ch. 84	556
North and South Western Junction Railway Company *v.* Brentford Union Assessment Committee	18 Q. B. D. 740; 13 App. Cas. 592	31
North Shore Railway Company *v.* Pion	14 App. Cas. 612	538
North-West Transportation Company *v.* Beatty	12 App. Cas. 589	555
North Western Rubber Company and Hüttenbach & Co., In re	[1908] 2 K. B. 907	314

O.

O'Driscoll *v.* Manchester Insurance Committee	31 Times L. R. 103	432
Olympic, The	[1913] P. 92	488
O'Neil *v.* Armstrong, Mitchell & Co.	[1895] 2 Q. B. 418	491

		PAGE
Ooster Eems, The	1 C. Rob. 284, n.; 1 Eng. P. C. 106, n.	124, 126
Oppenheim *v.* Russell	3 Bos. & P. 42	192

P.

Paine *v.* Partrick	Carth. 191	102
Palmer *v.* Grand Junction Railway Company	4 M. & W. 749	244
Pannell *v.* City of London Brewery Company	[1900] 1 Ch. 496	7
Parkdale Corporation *v.* West	12 App. Cas. 602	538
Parker *v.* London County Council	[1904] 2 K. B. 501	247
Parrish *v.* Hackney Corporation	[1912] 1 K. B. 669	224
Paul *v.* Virginia	75 U. S. 168	593
Pennsylvania R. R. Company *v.* American Oil Works	12 Am. St. Rep. 885; 126 Pa. St. 485	192
Penton *v.* Barnett	[1898] 1 Q. B. 276	7
Peter *v.* Kendal	6 B. & C. 703	63
Phillips *v.* Barker	5 B. & Al. 161	306
Pim *v.* Curell	6 M. & W. 234	63
Plumb *v.* Cobden Flour Mills Company	[1914] A. C. 62	405, 466, 473
Pott *v.* Flather	16 L. J. (Q. B.) 366	176
Potter's Stairs Ferry Case	12 C. B. (N.S.) 32	108
Potts *v.* Bell	8 T. R. 548	507
Powell *v.* Toronto, Hamilton and Buffalo Railway Company	25 Ont. App. R. 209	539
Pratt *v.* Cuff	Cited 4 East, 43	491
Pringle *v.* Stratford (City of)	20 Ont. L. R. 246	530
Printing and Numerical Registering Company *v.* Sampson	L. R. 19 Eq. 462	693
Progress, The	Edw. 210	142
Prohibition Case	[1896] A. C. 348	572, 590

R.

Radley *v.* London and North Western Railway Company	1 App. Cas. 754	721
Raglan Highway Board *v.* Monmouth Steam Company	46 J. P. 598	295
Rebeckah, The	1 C. Rob. 227; 1 Eng. P. C. 118	126
Reg. *v.* Cambrian Railway Company	L. R. 6 Q. B. 422	81
—— *v.* Eastern Counties Railway Company	4 B. & S. 58	345
—— *v.* Great Western Railway Company	15 Q. B. 379	42
—— *v.* Inland Revenue Commissioners	12 Q. B. D. 461	432
—— *v.* London, Brighton and South Coast Railway Company	15 Q. B. 313	41
—— *v.* Lords Commissioners of the Treasury	L. R. 7 Q. B. 387	432
—— *v.* Mile End Old Town Overseers	10 Q. B. 208	344
—— *v.* South Staffordshire Waterworks Company	16 Q. B. D. 359	355
—— *v.* West Middlesex Waterworks Company	1 E. & E. 716	344

		PAGE
Reid *v.* Blisland School Board	17 Times L. R. 626	244
Rex *v.* Castlechurch (Inhabitants)	Burr. S. C. 68	500
—— *v.* Eaton (Inhabitants)	Burr. S. C. 47	500
—— *v.* Kingswinford (Inhabitants)	7 B. & C. 237	41
—— *v.* Lords Commissioners of the Treasury	4 Ad. & E. 286	432
—— *v.* ——. In re Hand	4 Ad. & E. 984	432
——. In re Smyth	4 Ad. & E. 976	432
—— *v.* Marsden	3 Burr. 1812	68
—— *v.* New River Company	1 M. & S. 503	344
Reynolds *v.* Tilling	19 Times L. R. 539	721
Rice *v.* Toronto Railway Company	22 Ont. L. R. 446	725
Richards *v.* Wrexham and Acton Collieries	[1914] 2 K. B. 497	613
Riche *v.* Astbury Railway Carriage and Iron Company	L. R. 9 Ex. 224	570
River Weir Commissioners *v.* Adamson	2 App. Cas. 743	438
Roberts, In re	[1900] 1 Q. B. 122	431
Robinson *v.* Palmer	[1901] 2 I. R. 489	609
Rodger *v.* Paisley School Board	1912 S. C. 584	473
Rodocanachi *v.* Elliott	L. R. 9 C. P. 518	654
—— *v.* Milburn	18 Q. B. D. 67.	180
Rogers, In re	[1894] 1 Q. B. 435	431
Rose *v.* Buckett	[1901] 2 K. B. 449	431
Rosetto *v.* Gurney	11 C. B. 176	662
Rossia, The	2 Russ. & Jap. Prize Cases, 43	150
Rotch *v.* Edie	6 T. R. 413	655
Roumanian, The	[1916] A. C. 124	167
Rousillon *v.* Rousillon	14 Ch. D. 351	693
Roux *v.* Salvador	3 Bing. N. C. 266	654
Royal Bank of Canada *v.* Rex	[1913] A. C. 283	593
Ruby, The	6 Asp. M. L. C. 577	371
Rushforth *v.* Hadfield	7 East, 224	211
Russell *v.* Reg.	7 App. Cas. 829	589

S.

Saunders, In re	[1895] 2 Q. B. 424	431
Scott *v.* Dublin and Wicklow Railway Company	11 Ir. C. L. Rep. 377	726
Selmes *v.* Judge	L. R. 6 Q. B. 724	244
Serle, In re	[1898] 1 Ch. 652	7
Sewell *v.* Burdick	13 Q. B. D. 159; 10 App. Cas. 74	147, 148
Sharpington *v.* Fulham Guardians	[1904] 2 Ch. 449	244
Sharpness New Docks and Gloucester and Birmingham Navigation Company *v.* Attorney-General	[1915] A. C. 654	296
Sheffield Union *v.* Great Central Railway Company	[1909] A. C. 78	27
Sheffield United Gas Light Company *v.* Sheffield Overseers	4 B. & S. 135	345
Shine, In re	[1892] 1 Q. B. 522	431
Simpson *v.* Attorney-General	[1904] A. C. 476	63
Sinclair *v.* Brougham	[1914] A. C. 398	69
Sivewright *v.* Allen	[1906] 2 K. B. 81	490

		PAGE
Smith *v.* Lancashire and Yorkshire Railway Company	[1899] 1 Q. B. 141	466
Snell *v.* Brickles	50 Can. S. C. R. 360	277
Snow *v.* Crow's Nest Pass Coal Company	13 B. C. Rep. 145	725
South Eastern Railway Company *v.* Dorking Union	3 E. & B. 491	32
Spittal *v.* Glasgow Corporation	6 F. 828	262
Staniforth *v.* Lyall	7 Bing. 169	179
Steele *v.* Thompson	13 Moo. P. C. 280	171
Stephens *v.* Australasian Insurance Company	L. R. 8 C. P. 18	284, 654
Stettin, The	Br. & Lush. 199	369
Steward *v.* North Metropolitan Tramways Company	16 Q. B. D. 556	221
Stickney *v.* Keeble	[1915] A. C. 385	276
Stone *v.* Lidderdale	2 Anst. 533	433
Stoneham *v.* Ocean Railway and General Accident Insurance Company	19 Q. B. D. 237	284
Sutton's Hospital Case	10 Rep. 1 a.	578
Swart *v.* Jeffreys Bay Trustee	7 Juta, 110	170
Sydney Corporation *v.* Fleay	[1911] A. C. 371	185
——— *v.* Goodlet	12 N. S. W. State Reports, 355	184
——— *v.* Terry	[1907] A. C. 308	184
Synge *v.* Synge	[1894] 1 Q. B. 466	272

T.

Talargoch Lead Mining Company *v.* St. Asaph Union	L. R. 3 Q. B. 478	345
Tallis *v.* Tallis	1 E. & B. 391	693
Taylor *v.* Caldwell	3 B. & S. 826	496
Teutonia, The	L. R. 3 A. & E. 394	489
Thalia, The	2 Russ. & Jap. Prize Cases, 116	...127
Thames and Mersey Marine Insurance Company *v.* Hamilton, Fraser & Co.	12 App. Cas. 484	306
Thompson *v.* Ingham	14 Q. B. 710	320
——— *v.* Reynolds	3 C. & P. 123	606
——— *v.* Rowcroft	4 East, 34	521
Thomson *v.* Weems	9 App. Cas. 671	284
Tobago, The	5 C. Rob. 218; 1 Eng. P. C. 456	147
Toronto Public Schools Board *v.* City of Toronto	4 Ont. L. R. 468	531
Tripp *v.* Frank	4 T. R. 666	63
Trotter *v.* Harris	2 Y. & J. 285	63
Tucker *v.* Linger	8 App. Cas. 508	325
Tuff *v.* Warman	5 C. B. (N.S.) 573	724
Two Friends, The	1 C. Rob. 271; 1 Eng. P. C. 130	126

U.

Underwood (E.) & Son *v.* Barker	[1899] 1 Ch. 300	694
Union Steamship Company *v.* Claridge	[1894] A. C. 185	618

V.

		PAGE
Valin *v.* Langlois	5 App. Cas. 115	601
Vanquelin *v.* Bonard	15 C. B. (N.S.) 341	605
Venus, The	Rothery, 129	128

W.

Wadling *v.* Oliphant	1 Q. B. D. 145	431
Ward, In re	[1897] 1 Q. B. 266	431
—— *v.* Byrne	5 M. & W. 548	696
Warner *v.* Couchman	[1912] A. C. 35	473
Waterhouse *v.* Keen	4 B. & C. 200	258
Way *v.* St. Thomas (City of)	12 Ont. L. R. 240	530
Webber, In re	18 Q. B. D. 111	431
—— *v.* Wansborough Paper Company	[1915] A. C. 51	473
Weldon *v.* Neal	19 Q. B. D. 394	221
Wells *v.* Foster	8 M. & W. 149	441
Wertheim *v.* Chicoutimi Pulp Company	[1911] A. C. 301	177
Whitebread *v.* Sevenoaks Highway Board	[1892] 1 Q. B. 8	295
Whyte *v.* Rose	3 Q. B. 493	606
Wicks, In re	17 Ch. D. 70	431
Wiggins *v.* Ingleton	2 Ld. Raym. 1211	489
Wigglesworth *v.* Dallison	1 Doug. 201	331
Williams *v.* Lloyd	W. Jo. 179	512
—— Brothers *v.* Agius	[1914] A. C. 510	176
Woolley *v.* Clark	5 B. & Al. 744	606
Wright *v.* Snell	5 B. & Al. 350	192

Y.

Yard *v.* Ford	2 Wms. Saund. 500	71
Yates *v.* Whyte	4 Bing. N. C. 272	180
Ydun, The	[1899] P. 236	244

LIST

OF THE

JUDICIAL COMMITTEE

OF

HIS MAJESTY'S MOST HONOURABLE

PRIVY COUNCIL,

ESTABLISHED BY THE 3RD & 4TH WILL. IV., C. 41,

FOR HEARING AND REPORTING ON APPEALS TO HIS MAJESTY IN COUNCIL.

1916.

Lord *Buckmaster*, Lord Chancellor.
Earl of *Halsbury*.
Earl *Loreburn*.
Viscount *Haldane*.
Lord *Dunedin*.
Lord *Atkinson*.
Lord *Shaw*.
Lord *Mersey*.
Lord *Moulton*.
Lord *Parker of Waddington*.
Lord *Sumner*.
Lord *Parmoor*.
Lord *Wrenbury*.
Sir *Arthur Channell*.
Sir *Samuel Griffith*, G.C.M.G.
Sir *Edmund Barton*, G.C.M.G.
Sir *John Edge*.
Sir *Charles Fitzpatrick*, G.C.M.G.
Sir *James Rose-Innes*, K.C.M.G.
Syed *Ameer Ali*, C.I.E.
Sir *Lawrence Jenkins*, K.C.I.E.

And those other members of the Privy Council who are within the provisions of the statutes 3 *&* 4 *Will.* 4, *c.* 41, 44 *Vict. c.* 3, *and* 50 *&* 51 *Vict. c.* 70.

Appeal Cases

BEFORE

THE HOUSE OF LORDS

(ENGLISH—IRISH—AND SCOTTISH)

AND

THE JUDICIAL COMMITTEE

OF

HIS MAJESTY'S MOST HONOURABLE

PRIVY COUNCIL.

[HOUSE OF LORDS.]

FOX (PAUPER) . . . . . APPELLANT; H. L. (E.)*

AND 1915

JOLLY . . . . . RESPONDENT. *July* 16.

Landlord and Tenant—Covenant to Repair—Notice of Breach—Specification of particular Breaches—Addition of General Clause—Sufficiency of Notice—Conveyancing and Law of Property Act, 1881 (44 & 45 *Vict. c.* 41), *s.* 14, *sub-s.* 1.

A notice was served under s. 14 of the Conveyancing and Law of Property Act, 1881, by the lessor of six small houses, stating that the repairing covenants as therein set out had been broken and that the particular breaches complained of were the committing or allowing the dilapidations mentioned in the schedule annexed to the notice. The schedule indicated under general headings repairs which were required to be done in all the houses, and in a few instances only specified repairs to be done in particular houses. In some instances it required the lessee to "examine and repair"

---

* *Present:* LORD BUCKMASTER L.C., LORD ATKINSON, LORD PARKER OF WADDINGTON, LORD SUMNER, and LORD PARMOOR.

H. L. (E.)
1915
FOX
v.
JOLLY.

specified parts of the houses. The schedule concluded with the words "And note that the completion of the items mentioned in this schedule does not excuse the execution of other repairs if found necessary":—

Held, that the notice sufficiently specified the particular breaches complained of, and that it was not vitiated by the addition of the general clause at the end.

Decision of the Court of Appeal [1914] 2 K. B. 109 affirmed.

APPEAL from an order of the Court of Appeal affirming an order of the Divisional Court. (1)

The action was brought by the respondent to recover possession of six small houses known as 35, 37, 39, 41, 43, and 45, Menotti Street, Bethnal Green, London, on the ground that the covenants to repair contained in the under-lease by which those premises were demised had not been performed; and there was also a claim for mesne profits and damages for breach of covenant.

At the date of the under-lease hereinafter mentioned Martha Phillips Goodwin was entitled to the demised premises for the residue of a term of eighty-eight years from September 29, 1837, under a lease dated March 17, 1838.

By an under-lease dated August 19, 1873, Martha Phillips Goodwin demised the above-mentioned premises to James Abbott from June 24, 1873, for the term of fifty-two and a quarter years less three days. By that under-lease the said James Abbott covenanted for himself, his heirs, executors, administrators, and assigns, with the said Martha Phillips Goodwin, her executors, administrators, and assigns, that he, his executors, administrators, or assigns would at all times during the continuance of the term thereby granted at his or their costs and charges well and sufficiently repair, uphold, support, maintain, pave, purge, scour, cleanse, empty, whitewash, tile, glaze, amend, and keep the demised premises and all party and other walls, fences, pavements, and glass windows thereunto belonging, and all other erections and buildings and improvements which should at any time during the continuance of the said term be made to the demised premises with the appurtenances in, by, and with all and all manner of needful and necessary reparations and amendments whatsoever when, where, and as often as need or occasion should require. And would once in every third year

(1) [1914] 2 K. B. 109.

from Michaelmas Day, 1870, paint all the outside and in every seventh year from Michaelmas Day, 1872, all the inside wood and ironwork of and belonging to the demised premises where the same had been usually painted before with two coats of proper oil colour in a workmanlike manner ; and power was given to the said Martha Phillips Goodwin, her executors, administrators, and assigns, during the continuance of the term to enter upon the premises to examine the state and condition of the same, and of all defects, decays, and wants of reparation, cleansing, painting, and amendment then and there found, and to give three calendar months' notice in writing to the said James Abbott, his executors, administrators, or assigns, to repair and amend the same.

The under-lease also contained the usual power of re-entry on default being made in the payment of the rent and on the non-observance of the covenants.

At the date of the action the lease of March 17, 1838, was vested in the respondent and the under-lease of August 19, 1873, was vested in the appellant Marks Fox.

On March 21, 1912, the respondent by his solicitors served on the appellant Marks Fox by leaving the same on the demised premises a notice in writing dated March 20, 1912, setting out the repairing covenants and stating that the said covenants had been broken and that the particular breaches complained of were the committing or allowing the dilapidations mentioned in the schedule to the notice, and requiring the said appellant to remedy the breaches and to make compensation to the respondent for such breaches ; and the notice further stated that on the appellant's failure to comply with the notice within a reasonable time it was the respondent's intention to re-enter upon the premises and claim damages for breach of the covenants.

The schedule was intituled " Schedule of dilapidations allowed to accrue in and about the properties known as Nos. 35, 37, 39, 41, 43, and 45, Menotti Street, Bethnal Green," and it provided as follows :—

" External.

" Roofs, &c.

" Examine repair and reinstate all broken or loose tiles to main and w.c. roofs.

H. L. (E.) 1915 Fox v. Jolly.

"Clean out and repair all gutters downpipes gullies and cesspools.

"Make good all cement fillets and all flashings.

"Leave the roofs sound and watertight.

"Rake out all defective joints of brickwork and point to chimney stacks. Make good all flaunchings in cement.

"Remove cracked or broken chimney pots and reinstate with new.

"Clear away all rubbish from roofs.

"Fronts and Backs.

"Rake out the whole of the pointing to brickwork of houses and water closets not less than $\frac{1}{2}$" deep brush down and repoint in fine mortar gauged with cement and neatly weathered.

"Repair defective brickwork cutting cracked damaged or bulged portions and making good.

"Repair all window cills and cut out and reinstate broken cills where necessary.

"Point round all door and window frames where defective.

"Wash stop and paint with two coats of good oil color all woodwork to frames sashes doors and frames and other works before painted, the paint on front street doors to be burnt off before being repainted.

"Wash stop and paint with two coats of good oil color all cement dressings to window and door openings window cills and plinths.

"Repair and reinstate where necessary shutters to front windows also rails to area and front steps.

"Provide new stone work round area grating at No. 41 and new length of stack pipe at No. 43.

"Internal.

"Rooms and Staircases Generally.

"Hack off and make good all defective plastering.

"Repair all defective brickwork and partitions.

"Repair defective floors and skirtings.

"Repair woodwork of frames sashes linings doors and frames cupboards dressers and shelves.

"Reinstate scullery doors and frame at No. 35.

"Repair and reinstate sash lines beads window and door fastenings furniture and keys.

"Repair and reinstate defective stores and chimney pieces ranges copper and furnace work to same.

"Cut out all worn and broken treads rosings and risers repair and make good.

"Repair landings and other woodwork.

"Cut out and reinstate all defective and bulged ceilings.

"Wash stop and whiten all ceilings.

"Strip all walls and repaper with wall papers at 6*d*. per piece P.C. value.

"Distemper walls of sculleries and water closets.

"Wash stop and paint with two coats of good oil color all work before painted.

"GENERALLY.

"Paint and bring forward in oil color all repairs to wood and other work where before painted.

"Hack out and reinstate all broken glass.

"Examine and repair and put in good sanitary condition all sinks cisterns water closets supply and waste pipes ball valves and taps and all drains and gullies and flush out the same.

"Repair and make good all fences and tar same.

"Reinstate fastenings to front shutters.

"Repair and cleanse all floors and pavings in yards.

"Well and substantially repair uphold maintain and put the premises in thoroughly good repair and condition and note that the completion of the items mentioned in this schedule does not excuse the execution of other repairs if found necessary."

On June 27, 1912, the respondent commenced this action against the appellant and his subtenants who were in occupation of the demised premises. By his statement of claim the respondent, after referring to the service of the notice on the appellant Marks Fox, alleged that a reasonable time for the remedy of such breaches as were capable of remedy and of making reasonable compensation in money to his satisfaction had elapsed, but that many of the breaches had not been remedied, and that no compensation had been made to him for such breaches, and that he was therefore entitled to re-enter on the said premises and to mesne profits and damages.

The respondent delivered particulars of the breaches remaining

H. L. (E.) 1915 FOX v. JOLLY.

unremedied by the appellant. These particulars described the repairs to be done in much greater detail, distinguishing between the different houses and specifying the repairs required on each floor, and they differed in many respects from the schedule of dilapidations annexed to the notice of March 20, 1912. The appellant Marks Fox by his defence denied that the notice did in fact specify the alleged breaches of covenant in the action complained of, and alleged that the said notice was insufficient to comply with the requirements of s. 14, sub-s. 1, of the Conveyancing and Law of Property Act, 1881, by reason of the omission to specify the alleged breaches of covenant aforesaid.

The action was tried before an official referee, who held that the notice was not sufficient to comply with s. 14, sub-s. 1, of the Conveyancing and Law of Property Act, 1881, and gave judgment for the appellant Marks Fox.

The Divisional Court (Avory and Lush JJ.) reversed the decision of the official referee and remitted the action to him for re-trial. The decision of the Divisional Court was affirmed by the Court of Appeal by a majority (Buckley and Kennedy L.JJ., Vaughan Williams L.J. dissenting).

The appellant Marks Fox died after the presentation of the appeal to this House, and the appeal was revived in the name of Hannah Fox, the administratrix of the deceased.

1915. June 15. *Ernest Pollock, K.C.*, and *Charles A. McCurdy*, for the appellant. The notice on which this action is founded does not comply with the provisions of s. 14 of the Conveyancing and Law of Property Act, 1881, inasmuch as it did not specify the particular breaches complained of. The tenant is in no better position after receiving this notice than he was before. The tenant is entitled to a notice of what the breach is, and if it is capable of repair he is entitled to a notice which will enable him to set the matter right. This notice is not a specification of the work to be done; it is more like instructions to a surveyor to examine and see what requires to be done. Each house should have been taken separately and a list of the requirements given. The object of the notice is to inform the tenant of the liability imposed upon him so that he may obtain relief if he determines to fulfil the terms of the

notice. The notice must be dealt with as a whole, and so dealt with the test is whether it sufficiently puts the tenant in the position of knowing where he stands. This notice is rendered invalid by reason of the generality of its concluding words. A notice which specifies items A, B, and C and then goes on to make a vague and general claim is not a good notice, because as a whole it is not sufficiently precise.

The particulars of claim differ materially from the schedule of dilapidations. Inasmuch as the action is founded on the notice, the landlord's requirements should have been specified with the same particularity in the notice as in the particulars of claim.

The notice must be such as to give the tenant precise information of what is alleged against him and what is demanded from him: *Horsey Estate, Ld.* v. *Steiger* (1); *Fletcher* v. *Nokes* (2); *In re Serle* (3); *Penton* v. *Barnett.* (4) *Matthews* v. *Usher* (5) is inconsistent with these authorities and was wrongly decided. [They also referred to *Lock* v. *Pearce* (6) and *Pannell* v. *City of London Brewery Co.* (7)]

J. D. Crawford and *W. de B. Herbert*, for the respondent, were not called upon.

The House took time for consideration.

July 16. LORD BUCKMASTER L.C. My Lords, in this case it is not necessary to consider the rights of a landlord to re-enter on premises for non-payment of rent, although some reference was made to the subject in the arguments addressed to your Lordships. Such rights are unaffected by the provisions of the Conveyancing Act of 1881, and it is only with the terms of that statute that this appeal is concerned.

The question that is raised is very simple, involving the consideration of only a few facts and but one section of an Act of Parliament; it is, however, of undoubted importance to landlords and tenants, and consequently it may be desirable to state their relative position in some detail. Before the passing of the

(1) [1899] 2 Q. B. 79, at p. 91.
(2) [1897] 1 Ch. 271.
(3) [1898] 1 Ch. 652.
(4) [1898] 1 Q. B. 276, at p. 281.
(5) (1899) 68 L. J. (Q.B.) 988; 81 L. T. 542.
(6) [1893] 2 Ch. 271.
(7) [1900] 1 Ch. 496.

H. L. (E.) 1915 — Fox v. Jolly. — Lord Buckmaster L.C.

Conveyancing Act of 1881, a right of re-entry reserved in a lease conditional upon breach of a covenant to repair could be enforced by the landlord at common law without the tenant having opportunity to meet the complaint, and often without his knowing that the breach had in fact occurred. It is true that the Courts of Equity attempted to mitigate the harshness of this procedure, and in several reported cases restrained the landlords from exercising their rights where the breach was one which, by accident or surprise, the tenant had been unable to rectify. There was, however, no general rule relating to such relief on which reliance could be placed. In these circumstances the Conveyancing Act of 1881 was passed, and it was to extend and render certain the rights of tenants in such cases that s. 14 of that statute was framed. Sub-s. 1 of that section is in the following terms :—

"A right of re-entry or forfeiture under any proviso or stipulation in a lease, for a breach of any covenant or condition in the lease, shall not be enforceable, by action or otherwise, unless and until the lessor serves on the lessee a notice specifying the particular breach complained of, and, if the breach is capable of remedy, requiring the lessee to remedy the breach, and, in any case, requiring the lessee to make compensation in money for the breach, and the lessee fails, within a reasonable time thereafter, to remedy the breach, if it is capable of remedy, and to make reasonable compensation in money, to the satisfaction of the lessor, for the breach."

The effect of this sub-section is plain. The right of re-entry which the lessor enjoys on the breach of a covenant is not capable of being exercised against the lessee until the conditions in that sub-section have been satisfied. If such condition were not satisfied and entry were attempted at common law, such entry would be a trespass ; if proceedings were instituted to obtain possession they would be instantly demurrable. That is the meaning of the phrase, "shall not be enforceable by action or otherwise." Now the conditions precedent which the lessor must perform are these. He must serve a notice, and that notice must specify the breach of covenant which is the subject of complaint. That is, he must point out the covenant which he says is broken, and he must specify the breach of which he complains. He must also call upon

the lessee to remedy the breach, and if he requires compensation in money he must ask for it. After this has been done a reasonable time must elapse in which the lessee has the opportunity of complying with the requirements of the notice. It is only when this has been done, when the time has expired, and the work is incomplete, that the landlord can proceed to the assertion of his rights.

All this is common and familiar ground, and I do not know that it is in any way disputed by the appellants in this case, whose real complaint is that in the particular circumstances in which they stand no sufficient notice specifying the breach of contract was served upon them within the meaning of the section. This leads me to examine the facts that have given rise to the present dispute. They are few, and free from controversy. On August 19, 1873, certain premises known as 35, 37, 39, 41, 43, and 45, Menotti Street, Bethnal Green, in the county of London, were vested in one Martha Phillips Goodwin, for the residue of a term of eighty-eight years from September 29, 1837. By virtue of this interest she was enabled to sub-demise the premises for a term of fifty-two and a quarter years, less three days, from June 24, 1873, i.e., the residue of the term less three days ; and this she did by an under-lease which was dated August 19, 1873, made between herself of the one part and James Abbott of the other part. This under-lease contained covenants to repair, to keep in repair, to paint the outside in every third year and the inside in every seven, and such covenants were protected by the ordinary proviso for re-entry. Upon the exact terms of the covenants and the proviso nothing depends. In March, 1912, and at all subsequent dates, the original term of eighty-eight years was vested in Joseph Jolly, the respondent to this appeal, and the benefit of the under-lease of August 19, 1873, was when these proceedings were instituted vested in one Marks Fox. He has died since the appeal was presented to your Lordships, and the present appellant is Hannah Fox, his legal personal representative, who has been added by order of revivor.

In March of 1912 the premises were out of repair, and on March 21 of that year a notice was served dated the 20th, the sufficiency or insufficiency of which is the sole matter in this appeal. The notice was framed in paragraphs. The first set out in full the repairing

H. L. (E.) 1915 FOX v. JOLLY. Lord Buckmaster L.C.

covenants, and also a covenant as to painting inside and out. The second paragraph was in these terms: "The above-mentioned covenants have been broken, and the particular breaches which are complained of are the committing or allowing the dilapidations mentioned in the schedule hereto." And paragraph 4 stated that if the requirements of the notice were not complied with within a reasonable time power of re-entry would be enforced. This notice has unquestionably complied with the first condition referred to in s. 14 of the Act. It has plainly set out the covenants which it is alleged are broken, and the schedule contains what is alleged by the respondent to be a sufficient specification of the breach. The work mentioned in this schedule was not done within a reasonable time, and the present proceedings were accordingly instituted by the respondent against the people who were in actual occupation of the premises, claiming that he was entitled to enforce his right of re-entry. Marks Fox obtained leave to appear and defend the action, and he delivered a defence and a counter-claim on October 29, 1912, which contained, among other defences, one stated in paragraph 3 in the following terms:—

"The defendant Marks Fox admits that on the 21st March, 1912, the plaintiff served by leaving on the demised premises a notice in writing purporting to contain a schedule of dilapidations and purporting to specify breaches of the repairing covenants contained in the said under-lease alleged to have been found on the demised premises and requiring the lessee to make good the same and pay compensation in money to the plaintiff for such breaches. The defendant Marks Fox denies that the said notice did in fact specify the alleged breaches of covenant in this action complained of by the plaintiff and says that the said notice was insufficient to comply with the requirements of section 14 (1.) of the Conveyancing and Law of Property Act, 1881, by reason of the omission to specify the alleged breaches of covenant aforesaid."

The other defendants did not defend.

The case was by an order dated November 8, 1912, referred for trial to the official referee, Mr. Edward Pollock, and he, on April 4, 1913, decided that paragraph 3 of the defence was established and that judgment should be entered in the action for the defendant Marks Fox with costs.

The Divisional Court differed from this view, and on July 15, 1913, directed that the judgment of the official referee should be set aside and ordered a new trial.

The Court of Appeal, by a majority of two judges to one, supported this judgment of the Divisional Court, and from the Court of Appeal the present appeal has been brought before your Lordships' House. Thus the only question for consideration here is whether paragraph 3 of the defence to which I have referred was substantiated, and this depends solely upon the adequacy of the schedule to the notice of March 20.

Now the schedule is attacked on several grounds. It is said that it does not tell the tenant what it is he ought to do in order to remedy the breach of which the complaint is made. I am not prepared to accede to that view of the schedule. But even if it did not, I can find nowhere in the section any words which cast upon the landlord the obligation of telling the tenant what it is that he must do. All that the landlord is bound to do is to state particulars of the breaches of covenants of which he complains and call upon the lessee to remedy them. The means by which the breach is to be remedied is a matter for the lessee and not for the lessor. In many cases specification of the breach will of itself suggest the only possible remedy. For example, complaint that a covenant to paint or to paper has been broken can only be met by painting and papering. But it does not follow that this is always so. A particular covenant to keep the roof watertight, if broken, would be sufficiently defined by a reference to the covenant, a statement that the roof had not been kept watertight, and that the tenant was required to remedy the omission; the means by which this could be accomplished would be for the tenant to determine.

It was further urged that the schedule called upon the tenant to make examination on his own account of certain parts of the premises, and that this was a request to survey rather than a request to repair. It is true that in two cases, that of the roof and the drains, the schedule contains the following directions: "Examine, repair, and reinstate all broken or loose tiles to main and w.c. roofs." "Examine and repair and put in good sanitary condition all sinks, cisterns, waterclosets, supply and waste pipes, ball valves and taps,

H. L. (E.) 1915 — Fox v. Jolly. — Lord Buckmaster L.C.

and all drains and gullies, and flush out the same." Both these clauses would, in my opinion, have been perfectly good if the word "examine" were omitted; and I cannot see that its introduction vitiates the rest of the clause. It is true, also, that the schedule does not, except in two cases, refer to the numbers of the houses where particular work is to be done, and it is suggested that each house should have been particularized and the schedule separated so as to apply to each in turn. In certain cases this might be necessary, but each case must depend upon its own circumstances, and I can see no reason for such a course in the present instance. All these premises form one block of similar houses; they are held on one lease, are bound by one covenant, and it is alleged in general terms that the covenants have been broken throughout. It is indeed admitted that, in part at least, the breaches as specified in the schedule were sufficiently specified without the numbers. But then it is said that though this may be true the whole of the notice is rendered useless because other breaches are stated in general terms, and in particular because the schedule concludes with a general statement in the following words:—

"Well and substantially repair, uphold, maintain, and put the premises and appurtenances in thoroughly good repair and condition, and note that the completion of the items mentioned in this schedule does not excuse the execution of other repairs if found necessary."

I do not think the description in the schedule is too general in its nature, nor am I able to see that the addition of the general phrase at the foot can possibly destroy the efficacy of the schedule as a whole. No form whatever is provided by the statute as the form in which the notice is to be given. It might be associated with useless and irrelevant matter, and it would none the less be a notice under the section if it was clear from its terms that it was so intended and if in fact it contained in plain language the information the section requires.

My Lords, several authorities were referred to in the course of the arguments to which some reference is necessary. The first is *Lock* v. *Pearce*. (1) In that case no request was made for compensation in the notice. It was none the less held that it was

(1) [1893] 2 Ch. 271.

good. The notice also demanded payment of the surveyor's fees, which the lessor had no right to require, and it was decided that this in no way vitiated the notice. So far, therefore, as this case affects the matter it affords authority for the views I have expressed.

The next case is *Fletcher* v. *Nokes*. (1) In that case a notice was served containing no further details than the statement that the covenants for repairing the inside and outside of certain houses had been broken. It was decided, and in my opinion quite rightly, that this notice did not comply with the terms of the statute.

The judgment of North J., however, contained statements which have, I think, been misunderstood in one of the subsequent cases; he said:

"Suppose that s. 14 had not been passed, and the previous law had remained in operation, and the landlord had brought an action against the tenant for breach of covenant, the first thing which the landlord would have been compelled to do would have been to give particulars of the breaches on which he relied, in order that the tenant might know what he had to meet. I think that s. 14 was intended to place the tenant in a better position than he was in before. He was to have the option of doing, before action brought, all those things the neglect of which would have been the ground of relief against him if s. 14 had not been passed. It is impossible to suppose that the tenant was intended to be before action in a worse position, with respect to alleged breaches, than he would formerly have been in after action. I think the notice which is to be given under s. 14 ought to be such a notice as will enable the tenant to understand with reasonable certainty what it is which he is required to do. I do not mean that the landlord need go through every room in a house and point out every defect. But the notice ought to be so distinct as to direct the attention of the tenant to the particular things of which the landlord complains, so that the tenant may have an opportunity of remedying them before an action to enforce a forfeiture of the lease is brought against him."

I see no reason to differ from this statement, except so far as it seeks to establish the standard—often fluctuating and uncertain—of particulars in an action as a test of the sufficiency of the notice.

(1) [1897] 1 Ch. 271.

H. L. (E.)
1915
FOX
v.
JOLLY.
Lord Buckmaster L.C.

Even, however, if this were accepted, it should be remembered that the particulars which would be required in an action that merely claimed possession for breach of a covenant to repair would not necessarily be as detailed and minute as the particulars that would be wanted where a claim was being made for damages for breach of the covenant, and it is rather in comparison with this latter class of particulars that the appellant seeks to have the notice tested.

The next case, of *Penton* v. *Barnett* (1), is a case which has no bearing upon the present dispute, excepting for the following statement in the judgment of Collins L.J. at p. 281 :—

"I think, however, that we ought to construe the words 'particular breach' in the section according to the obvious intention of the Legislature, which was that the tenant should be informed of the particular condition of the premises which he was required to remedy. The expression 'breach' means the neglect to deal with the condition of the premises so pointed out, and not merely failure to comply with the covenants of the lease. The common sense of the matter is, that the tenant is to have full notice of what he is required to do."

A statement to the similar effect was made by Lord Russell in the case of *Horsey Estate, Ld.* v. *Steiger*. (2) These cases add little to the former decision of North J., they only express the same view in different language.

In re Serle (3) involved a different question. In that case the notice was sufficiently specific with regard to two of the covenants referred to, but was indefinite in relation to another. Kekewich J. held that it was bad altogether. The exact point decided in that case does not arise here for decision and it may be reserved for the future. So far as it assumed that the landlord would be at liberty to proceed to re-enter for breach of the covenant which had been the subject of the indefinite description, it was not, I think, warranted by the terms of the statute. The landlord could not re-enter for such a breach, since in respect of that covenant he had not satisfied the statutory requirements ; but it does not necessarily follow that imperfect description of the breach of one covenant would take

(1) [1898] 1 Q. B. 276. (2) [1899] 2 Q. B. 79, at p. 91.
(3) [1898] 1 Ch. 652.

away from him the right to re-enter for breach of the other covenants which had been sufficiently described.

The last case is that of *Pannell* v. *City of London Brewery Co.* (1), where it was decided that a notice which specified two breaches and something else which was not a breach was none the less good since the breach complained of had been specified together with the addition of something which was immaterial.

I regard this view as the correct interpretation of the section. The notice must state with sufficient particularity the breach of which the landlord complains, and that breach the tenant must satisfy within a reasonable time. If he does satisfy it, it would not be open to the landlord to allege that there was another breach of another covenant, which had been referred to in the notice, but had not been sufficiently specified, which had not been remedied.

In the present case I think the notice sufficiently specified the landlord's complaints. It gave the tenant adequate notice of what he was required to do, and it provided full and sufficient information upon which he could determine what course of action he should adopt. For these reasons I think this appeal should fail.

I have only to add that it would be very unfortunate if, in every case where a landlord was serving notice under s. 14, he should feel himself bound to obtain a surveyor's detailed specification of the work to be done. It would greatly increase the cost which, if the work were performed by the tenant before proceedings were instituted, would fall on the landlord, or, if the tenant were compelled to obtain relief, would, by the Act of 1892, fall upon the tenant.

I am glad to think that no such obligation is imposed by the statute.

LORD ATKINSON. My Lords, I think this is a perfectly plain and clear case. Certain premises, described as 35, 37, 39, 41, 43, and 45, Menotti Street, Bethnal Green, London, were held by one Marks Fox, deceased, under an under-lease dated August 19, 1873, from the predecessor in title of the respondent, for a term of fifty-two and a quarter years less three days from June 24, 1873.

This under-lease contained, amongst others, a covenant well and sufficiently during the term to "repair uphold support maintain

(1) [1900] 1 Ch. 496.

H. L. (E.) 1915 FOX v. JOLLY. Lord Atkinson.

pave purge scour cleanse empty whitewash tile glaze amend and keep the said premises and all party and other walls fences pavements and glass windows thereunto belonging and all other erections and buildings thereunto belonging, and all other erections and buildings and improvements which shall at any time during the continuance of the said term be made to the said demised premises with the appurtenances in by and with all and all manner of needful and necessary reparations and amendments whatsoever when where and as often as need or occasion shall require."

The sub-lease contained a further covenant that the sub-lessee should in every third year, from Michaelmas, 1870, paint all the outside, and in every seventh year, from Michaelmas, 1872, all the inside wood and iron work in the manner therein described. And yet again another covenant that the lessee should repair and keep in repair the roadway and footway fronting the said premises, with a condition of re-entry if the sub-lessee should not well and truly observe, perform, and keep all the covenants, clauses, and agreements contained in the lease.

It is plain, even to the most unimaginative, that the sub-lessee might be guilty of at least twenty or thirty acts or omissions, each of which would amount to a breach of one or more of the covenants in the lease, and each of which, if proved, would, at common law, entitle the person in whom the sub-lessor's interest was vested to re-enter, and in an action of ejectment, therefore, to recover possession of the demised premises.

My Lords, the respondent, in the month of July, 1912, instituted an action to recover possession of these premises, alleging that they were not in good and sufficient repair and condition, in accordance with the covenants in the lease.

In the sixth paragraph of his statement of claim it is averred that the plaintiff duly served upon the said Marks Fox a notice in writing, with a schedule of dilapidations specifying the breaches of the repairing covenants contained in the lease which had been found on the demised premises, and requiring the lessee to make good the same, and to make compensation therefor to the respondent.

In the seventh paragraph of the statement of claim it was further averred that the breaches mentioned were capable of remedy, that a reasonable time for remedying them and paying reasonable

compensation in respect of them had elapsed, but that many of the breaches had not been remedied, nor had any compensation been paid, and that particulars of the breaches which had not been remedied were delivered therewith.

The relief claimed was possession of the demised premises, mesne profits, and 80*l.* damages for breaches of the covenants.

Marks Fox filed a defence and counter-claim, with one paragraph of which the House on this appeal is alone concerned, namely, that in which it is alleged that the notice served on March 21, 1912, purporting to specify the breaches of the repairing covenants complained of, and purporting to contain a schedule of dilapidations, was insufficient to comply with the requirements of s. 14 sub-s. 1, of the Conveyancing and Law of Property Act of 1881, by reason of its omitting to specify the alleged breaches of covenant complained of.

My Lords, I think that paragraph of the statement of defence is most unhappily phrased. In argument, however, what it was meant to assert was shown to be this, that if a dozen breaches of one covenant, or of several covenants, were all complained of, each of which would entitle a lessor to re-enter, the lessor's action must fail if notice of each and every breach be not given with sufficient particularity to satisfy the statute. The vague and uncertain description of one breach vitiates, it was contended, the precise and accurate description of all the others, and renders the notice containing both such an insufficient notice within the 14th section of the Conveyancing Act of 1881 as to deprive a lessor of his right of action in respect of any breach.

In my view that contention is based on a wholly erroneous and mistaken view of the aim, object, and requirements of this section. The aim and object of the statute was to prevent a lessor from recovering possession of demised premises by reason of any particular breach of a covenant in respect of which particular breach he had not given such a notice as satisfies the requirements of the section.

I am quite willing to accept for the purposes of this case the description of a sufficient notice given by North J. in *Fletcher* v. *Nokes* (1), namely, that " it ought to be so distinct as to direct

(1) [1897] 1 Ch. 271, at p. 274.

H. L. (E.) 1915 FOX v. JOLLY. Lord Atkinson.

the attention of the tenant to the particular things of which the landlord complains, so that the tenant may have an opportunity of remedying them before an action to enforce a forfeiture is brought against him," but in applying that statement of the law in any given case, it should be borne in mind that the notice is addressed to a person who knows, or ought to know, the nature and condition of the premises of which he is the tenant, so that a statement might be sufficient to draw his attention to the things of which the landlord complains, which might be insufficient so to do in the case of a stranger who had never seen or who knew nothing of the premises.

The penalty imposed upon the landlord for omitting to give sufficient notice in respect of any particular breach on which he desires to rely is that he shall not be permitted to rely upon it as a good cause of action entitling him to recover on ejectment by reason of a forfeiture. But that imposes no impediment whatever to his recovering possession on a forfeiture by reason of some other breach of covenant, of which he has given clear, precise, adequate, and sufficient notice, satisfying the requirements of the statute.

The breaches cannot, in my view, be taken in globo, nor can the several statements contained in the notice be taken in globo. Each breach working a forfeiture must be taken by itself, and the statement in the notice dealing with it be taken by itself. If these two combined would have entitled the landlord to enforce the forfeiture if they stood alone, no other breach being complained of or referred to in the notice, then in my view he would still be entitled to enforce the forfeiture and recover possession, though many other breaches should be complained of in reference to which the notice given was defective.

My Lords, I express no opinion on the question to what extent, if any, the fact that the landlord has purported to complain of several breaches in reference to which his notice is defective may deprive him of the right to rely upon those breaches in any subsequent litigation, as that question has not been raised in the case and is not before the House. It has been suggested that these breaches should be held to have been waived. It may be so, but I abstain from committing myself in any way upon that question.

Now, it cannot be successfully contended that the notice was

not sufficiently specific to satisfy the statute in respect of several of the breaches complained of, each of which would, if proved, have entitled the respondent to recover if it stood alone. In my opinion, it was sufficiently clear and specific to satisfy the requirements of the statute in respect to several of the breaches. If that be so, then the fact that the notice is too vague in reference to some other of the breaches mentioned, even if true, does not, I think, vitiate the notice in toto, or afford a defence to the respondent's action.

The fact that the particulars given in the action of the breaches still unremedied do not correspond precisely with the statement of the breaches in the notice was much referred to, but the effect of the discrepancy was, I think, not correctly apprehended.

The particulars may well be looked at in order to ascertain what are the breaches of which the respondent complains in his statement of claim. If the notice does not deal with these, then the respondent cannot rely upon them, because he has not given any notice, or any adequate notice, in respect of them. And the action must proceed, if it proceeds at all, as if they were omitted from the particulars altogether.

For these reasons I think the decision appealed from was right and should be upheld, and this appeal be dismissed with such costs, if any, as are awarded in cases where the appellant sues in forma pauperis.

My noble and learned friend Lord Parker of Waddington desires me to say that he concurs in the judgment I have just delivered.

LORD SUMNER. My Lords, what the appellant has to show is that as matter of law this notice does not satisfy the statutory condition precedent to the landlord's right to bring ejectment on the forfeiture clause in this lease. The official referee dismissed the action in limine on this ground, independently of any special circumstances peculiar to the tenant, the tenements, or the case.

The argument is twofold—first, that the notice says too much; second, that it says too little. I think it is also suggested to be so vague as to say nothing at all, but probably this argument is only a variant of the others. The notice itself is free from ambiguity. It contains a few technical builders' terms, but they are familiar, and nobody suggests that they are doubtful or confusing. For the

H. L. (E.) 1915 FOX v. JOLLY. Lord Sumner.

rest the meaning is perfectly plain. Cases might be conceived in which special circumstances might cause terms apparently plain to be in reality obscure, as for instance if there were two houses of the same name, or two rooms identical in description, or if the repairs specified in the notice, though clear enough on paper, were unintelligible when actually applied to the premises. Such cases, however, would require evidence to show the ambiguity or the confusion, and no such evidence was given. What the effect would be if it had been given I need not consider.

The concluding words of the notice are said to open a vista of further repairs, which, being unspecified, fail to satisfy the section. It is true these further matters are not specified, but neither are they complained of. These are not words requiring the lessee to remedy something, but they reserve the lessor's rights in case he should hereafter discover any breach of which he does not at present complain. I see nothing against this in the section. It does not say that the landlord can serve such a notice once only, or that, if he reserves further rights on which he does not at present intend to insist, he defeats those on which he does.

On the other hand, this notice is criticized as saying too little, because it often specifies the breaches complained of in somewhat general terms. They may be "specified" within the section for all that. The notice says "repair," or sometimes "Examine and repair" this, that, and the other, "where necessary." If it were true to say of the notice that it really only says "perform the covenants," though it says it over and over again, with many words and little meaning, I agree that the notice would not comply with the Act. The statutory notice is very far from being a mere form. It must, however, often be the case that nothing more is practicable than to name some part of the premises and say examine and repair it where necessary. The actual defects may be undiscoverable till actual work has begun, yet the evidence of their reality may be there. Often no description would identify the brick or the slate or the patch of wall or the piece of wood which needs repair. The remedy is to go and see. This being so, I think it is impossible to say that such expressions are in law incapable of satisfying the requirements of the section. Again, it was argued that the landlord should not only tell the tenant what to do, but

how to do it. There is nothing of the kind in the section. The legal standard of repair, which the covenant requires, is matter of law, and the tenant is to be taken to know it; the practical way of effecting the repair is not to be dictated by the landlord, but to be recommended by a builder.

My Lords, I do not think it matters whether this lease is regarded as containing one repairing covenant with several branches or several repairing covenants in one group; for in the former case the branches are clearly separable so that the result is the same. No tenant need have any difficulty here in knowing item by item what words of obligation are said to have been broken, or in what particular part of the premises he will find the evidence of his neglect, or what specific matters connected with those parts constitute the subject of the complaint. He cannot doubt that he is required to remedy each and every one of them. Some might possibly have been specified with more detail, but the section says "specifying the particular breach," not specifying it "as particularly as possible." It requires a notice to repair, not a surveyor's specification of repairs, or a builder's estimate of work to be done. It confers a great boon on the tenant, but it ought not to be turned into a trap for the landlord. To hold this notice to be in law no compliance with the section would, in my opinion, arm the tenant with a quibble, where only a shield against oppression was intended.

I think the appeal should be dismissed.

LORD PARMOOR. My Lords, in my opinion this is a simple case and I agree in the judgments of the Divisional Court and of the Court of Appeal, and think that the appeal should be dismissed. The only question is whether a notice served on March 21, 1912, is a sufficient notice to comply with s. 14 of the Conveyancing and Law of Property Act, 1881. A notice under the section is required to specify the particular breach complained of, that is to say, the particular breach of any covenant or condition of the lease of which the lessor complains, and for the breach of which he desires to enforce his right of re-entry or forfeiture under any proviso or stipulation in the lease.

It was argued that a notice was not sufficient to comply with

H. L. (E.) 1915 FOX v. JOLLY. Lord Parmoor.

the section, unless in substance it gave the same particulars as the lessor might be ordered to deliver in an action claiming possession of the demised premises. The particulars delivered in the action in which the respondent was plaintiff were referred to in illustration of this argument. In my opinion this argument is not sound. There is a clear distinction between a sufficient notice to specify the particular breach of which the lessor complains and the particulars required in the lessor's action. I agree in what has been said under this head in the Court of Appeal by Buckley L.J., and it is unnecessary to say more.

My Lords, in my opinion a notice is sufficient to comply with s. 14 if it specifies to the lessee the breach complained of, with such particularity, as fairly to tell him what it is he is required to remedy, if it is capable of remedy, and what it is for which he is required to make compensation in money. To determine whether a notice complies with this test depends on the information which the notice, as a whole, may be fairly said to give. A notice does not become insufficient because it may contain wider requirements than can be substantiated in the action, or because it is open to criticism on a meticulous examination of some of the phrases employed. The risk that the notice does not sufficiently specify some particular breach falls upon the lessor, who cannot enforce his rights of re-entry or forfeiture for the breach of any covenant or condition in the lease, unless in respect of such covenant or condition he has specified the particular breach of which he is making complaint.

Applying the test stated above, the notice cannot be said to be insufficient on a preliminary objection such as was taken before the official referee. I cannot think that any one reading it would not have a fair notice of the particular breaches of which complaint is made, or that these are not sufficiently specified under the headings External, Internal, and Generally. It may be that such words as "examine" or "where necessary" are superfluous, but they cannot really embarrass the tenant and do not invalidate a notice which in other respects is sufficient. I should read the notice as applicable to premises in a very bad state of repair and giving ample notice of the large number of particular breaches complained of both outside and inside the premises. The addition at the end

of the notice of a general requisition to repair, uphold, maintain, and put the premises and appurtenances in thoroughly good repair and condition does not make the notice invalid so far as it specifies particular breaches complained of, although the lessor could not rely on such a mere general requisition as a compliance with the section so as to make his right of re-entry or possession enforceable by action. I think that the notice should be construed as a whole in a common-sense way, and that no lessee could have any reasonable doubt as to the particular breaches which are specified.

My Lords, I concur that the appeal should be dismissed.

Order of the Court of Appeal affirmed and appeal dismissed.

Lords' Journals, July 16, 1915.

Solicitor for appellant: *Alexander Rubinstein.*

Solicitors for respondent: *Syrett & Sons.*

[HOUSE OF LORDS.]

GREAT WESTERN AND METROPOLITAN RAILWAY COMPANIES . . . . . } Appellants;

AND

KENSINGTON ASSESSMENT COMMITTEE . Respondents.

GREAT WESTERN AND METROPOLITAN RAILWAY COMPANIES . . . . . } Appellants;

AND

HAMMERSMITH ASSESSMENT COMMITTEE Respondents.

Rating—Railway—Joint Line—Actual net Earnings within Parish—Contributory Value—Competitive Value.

A suburban railway, constructed by a company since dissolved, ran from H. to W., where it joined the Great Western Railway, which in turn joined the Metropolitan Railway at B. The appellants, the Great Western and Metropolitan Railway Companies,

---

* *Present:* Lord Buckmaster L.C., Earl Loreburn, Lord Atkinson, Lord Parker of Waddington, and Lord Parmoor.

H. L. (E.)

1915

GREAT WESTERN AND METROPOLITAN RAILWAY COMPANIES *v.* KENSINGTON ASSESSMENT COMMITTEE.

SAME *v.* HAMMERSMITH ASSESSMENT COMMITTEE.

were jointly owners and occupiers of this railway under a conveyance confirmed by Act of Parliament, and were thereby enabled to run a through service of trains from H. to the city of London. On an appeal against an assessment for rating purposes of the running lines of this railway, the quarter sessions found that the railway earned no profits but had a contributory value as a feeder to the appellants' systems, but held that they were not entitled to have regard to its contributory value. They also found that, apart from treating the appellants as possible competitors for the railway, the railway had no competitive value, and that competition was possible between the appellants only on the assumption that after the dissolution of the existing partnership the Metropolitan Railway Company was still to be considered as having running powers over the Great Western Railway between the points B. and W.; and, excluding competitive value, they assessed the line solely on its net earnings in the parish and fixed the rateable value thereof at a nominal amount:—

Held—(1.) applying the principle of *Great Central Ry. Co.* v. *Banbury Union Assessment Committee* [1909] A. C. 78, and distinguishing *East London Railway Joint Committee* v. *Greenwich Union Assessment Committee* [1913] 1 K. B. 612, that contributory value ought not to be taken into account; (2.) that no question of competitive value arose; (3.) that the line had been rightly assessed on the basis of its net earnings in the parish.

Decision of the Court of Appeal reversed.

THESE were appeals against two orders of the Court of Appeal affirming orders of the King's Bench Division upon two cases stated by the Court of Quarter Sessions of the county of London.

In the quinquennial valuation lists made for the parishes of Hammersmith and Kensington in the year 1910 the appellant companies were assessed in respect of the portion of the lines of the Hammersmith and City Railway which was situate within the parish of Hammersmith at 9780*l.* as the gross value and 4890*l.* as the rateable value; and in respect of the portion of the lines which was situate within the parish of Kensington at 3900*l.* as the gross value and 1950*l.* as the rateable value. The appellants were also assessed in respect of the portions of the said railway other than railway lines, such as stations, coal sheds, &c., situate in the respective parishes.

The appellants appealed against the assessments in respect of the running lines in the two parishes to the Court of Quarter Sessions. They did not appeal against the assessments in respect of the stations, &c.

The quarter sessions stated substantially identical cases on the two appeals.

The appellants were jointly the owners and occupiers of the Hammersmith and City Railway, which was situate in the parishes of Paddington, Kensington, and Hammersmith, in the county of London.

The Hammersmith and City Railway was constructed by the Hammersmith and City Railway Company under powers conferred upon them by the Hammersmith and City Railway Act, 1861 (24 & 25 Vict. c. clxiv.). The said company were subsequently empowered to lease or sell their undertaking to the appellant companies or either of them by the Hammersmith and City Railway Act, 1865 (28 Vict. c. ci.), and ultimately conveyed their undertaking to the appellant companies by an agreement dated June 24, 1867. By s. 69 of the Great Western Railway (Various Powers) Act, 1867 (30 & 31 Vict. c. cl.), which received the Royal assent on July 15, 1867, the Hammersmith and City Railway Company was dissolved, and it ceased to exist from such last-mentioned date. The undertaking of the Hammersmith and City Railway under the said Act was vested jointly in the Great Western Railway Company and the Metropolitan Railway Company, and was carried on by a joint committee of the said companies.

The lines of railway forming the Hammersmith and City Railway were about three miles in length and extended (through parts of the parishes of Hammersmith, Kensington, and Paddington) from Hammersmith Broadway to a junction with the Great Western Railway close to Westbourne Park Station. The said lines were also connected by two short spur lines (both in the parish of Hammersmith) with the West London Railway and the London and South Western Railway respectively. At the said junction with the Great Western Railway the lines of the Hammersmith and City Railway connected with the lines of the Great Western Railway, which in turn connected with the lines of the Metropolitan Railway at or near Bishop's Road Station.

The Hammersmith and City Railway was opened for traffic on June 13, 1864, and had since been worked by the appellant companies, who were thereby enabled to run, and in fact did run, services of trains about every six minutes each way between

H. L. (E.) 1915

GREAT WESTERN AND METROPOLITAN RAILWAY COMPANIES v. KENSINGTON ASSESSMENT COMMITTEE.

SAME v. HAMMERSMITH ASSESSMENT COMMITTEE.

Hammersmith Broadway and the City and also about every ten minutes each way between Addison Road and the City. Traffic from the said lines destined for the Great Western Railway system was enabled to get on to such system at Westbourne Park Station, and traffic from the said lines destined for the City was enabled to arrive in the City by travelling over the lines of the Great Western Railway, referred to above as connected with the lines of the Metropolitan Railway at or near Bishop's Road Station, but not otherwise.

The said lines served as a feeder for the system of each of the appellant companies.

The Hammersmith and City Railway, when constructed and opened in the year 1864, provided a through route for passenger traffic between Hammersmith and its neighbourhood on the one hand and the city of London on the other. There was at that time no other railway communication between those districts. Since the year 1864 the following lines of railway had been opened for traffic, each of which provided a route between those districts other than the route provided by the Hammersmith and City Railway, namely :—

The Metropolitan District Railway, opened for traffic in 1874.

The Central London Railway, opened for traffic in 1900.

The Great Northern, Piccadilly, and Brompton Railway, opened for traffic in 1906.

The said lines of railway were all worked by electric power.

From the year 1908 onwards various services of motor omnibuses had been opened, which provided, in conjunction with the various lines of railway, communication between the said districts.

The traffic on the Hammersmith and City Railway had suffered severely from the competition of the lines of railway and of motor omnibuses above referred to.

The appellants had installed a system of working by electrical power on the Hammersmith and City Railway and now worked the said railway thereby. The said installation was completed in December, 1906.

It was admitted by the respondents that the earnings of the the said lines were not sufficient to justify the assessment appealed against if the lines of railway in question must be assessed solely

with regard to the earnings of the said lines within the parish in which such lines were assessed, and that the rateable value of the said lines must in that case be inserted in the valuation list at nil.

It was contended by the appellants that owing to the decisions of the House of Lords in the cases of *Great Central Ry. Co.* v. *Banbury Union* and *Sheffield Union* v. *Great Central Ry. Co.* (1) the said lines of railway must be valued on the basis of the actual earnings in the parish, and that therefore the rateable value of the said hereditaments ought not to be entered at more than a purely nominal figure and that evidence of contributory value ought to be excluded. They also contended that the Court was not entitled to have regard to any question of competitive value unless the respondents could prove the existence of some actual competitor willing to pay a rent for the said lines. They further contended that, even if the Court was entitled to enter upon an inquiry whether there were any possible competing tenants for the said lines of railway, there was in fact no tenant who could be found who would give a rent for the said lines, and they called evidence to show that there was in fact no such possible tenant. They also contended that, even if the lines of the railway did serve as a feeder to other lines owned by the appellants, the Court was not entitled to take such facts into consideration in fixing the rateable value of the said hereditaments.

It was contended by the respondents that the cases of *Great Central Ry. Co.* v. *Banbury Union* and *Sheffield Union* v. *Great Central Ry. Co.* (1) did not apply to the lines of railway in question, and that the Court was entitled to take into consideration all the facts in connection with the said lines. They called evidence to prove that (although no tenant could be certainly pointed out as willing to give a higher rent for the said lines than was justified by the actual earnings in the parish) from the geographical position of the said lines and owing to their contributory value to the system of both or either of the appellant companies it was probable that either the appellants separately or in combination or some other company or persons would, if the said lines were in the market, be willing to give for them an annual rent sufficient to justify the

(1) [1909] A. C. 78.

H. L. (E.) 1915

GREAT WESTERN AND METROPOLITAN RAILWAY COMPANIES v. KENSINGTON ASSESSMENT COMMITTEE.

SAME v. HAMMERSMITH ASSESSMENT COMMITTEE.

rateable value appealed against. They also contended that the Court was entitled to take into account the value of these lines to the appellants as a feeder to their other lines and to have regard to the statutory rent in fact paid, and that in these circumstances the rateable value placed thereon in the said valuation list was correct.

The Court of Quarter Sessions found as facts :

(1.) That the appellant companies made no profit earned upon the lines in question.

(2.) That there was a contributory value to the said lines as feeders to the systems of each of the appellant companies, because by carrying passengers to, from, and over such systems the receipts and profits of the appellant companies on their systems were larger than they otherwise would have been.

(3.) That the evidence offered by the respondents had not satisfied them that there were competitors who could be ascertained as such and who would be willing to pay a rent for the tenancy of the said lines.

(4.) That if they were entitled to take into consideration the contributory feeding value attaching to the said lines of railway the assessments appealed against were correct; but that if they were not so entitled, the rateable value of the said lines of railway in Hammersmith was 100*l.* and in Kensington was 60*l.*

(5.) That in view of the length of time that had elapsed since the said Act was passed in the year 1867 and the general changes that had taken place, more especially since that year, the provisions of the said Act were valueless for the purpose of guiding their decision.

They held :

(1.) That if the lines of railway in question must be assessed solely with regard to their actual earnings within the parish, then the rateable value of the said hereditaments must be entered at a nominal figure ; but if they were entitled to have regard to elements of value in respect of the said lines other than the actual earnings in the parish, namely, the evidence of the contributory value of the said lines given by the respondents, then the figures appealed against were correct.

(2.) That the question of competition could be given in evidence

if there were ascertained persons who came and said "We are willing to give a rent," but that they were not entitled to have regard to the said evidence of competitive value, inasmuch as no evidence of the existence of any actual ascertainable competitors was given by the respondents, as they held must be done in order to prove competitive value.

(3.) That they were not entitled in respect of the said lines of railway to have regard to the element of contributory value as a feeder to the lines of either or both of the appellant companies which they found as a fact existed.

They therefore allowed the appeals and reduced the gross and rateable values respectively of the said hereditaments in the parish of Hammersmith to 200*l.* and 100*l.*, and in the parish of Kensington to 120*l.* and 60*l.*

The questions for the opinion of the Court were:

(A) Whether the quarter sessions were right in holding that in ascertaining the value for the purposes of the rating of the said lines of railway the same must be assessed solely with regard to the actual earnings of the said lines within the parish.

(B) Whether they were right in holding on the facts above stated that they were not entitled to have regard to the said evidence of competitive value in respect of the said lines.

(C) Whether they were right in holding that they were not entitled to have regard to the contributory value of the said lines as a feeder to the other lines of either or both of the appellants.

The Divisional Court (Lord Alverstone C.J., Pickford and Avory JJ.) referred the cases back to the quarter sessions for restatement by showing whether, if the said lines were in the market, possible competitors for their occupation, including the appellant companies, separately as well as jointly, and any other competitors would give a rent for the lines sufficient to support the assessments appealed against.

In a further statement made in compliance with this order the chairman of quarter sessions stated that at the hearing of the appeals before him he decided that there was no competition with the Great Western Railway Company, but that in doing so he did not consider the case of the Metropolitan Railway Company, which was in partnership with the Great Western Railway Company to

H. L. (E.) 1915

GREAT WESTERN AND METROPOLITAN RAILWAY COMPANIES v. KENSINGTON ASSESSMENT COMMITTEE.

SAME v. HAMMERSMITH ASSESSMENT COMMITTEE.

work the Hammersmith line and had been so for years; that if the Metropolitan Company, after dissolution of the partnership and becoming a rival, was still to be considered as having running powers over the Great Western line between Bishop's Road and Westbourne Park under the Acts and agreements scheduled thereto, or would obtain such running powers by becoming tenants of the Hammersmith and City line, then he held that the Metropolitan Company would be a competitor and that the view of the local authority was right. If otherwise, then he held that the Metropolitan Company would not be a competitor, as it had no physical contact with the Hammersmith line, nor would it be worth while for it to create such for that purpose. He did not think that any other competitor would give a rent for the Hammersmith line sufficient to support the assessment appealed against.

SCHEDULE.

The Metropolitan Railway Act, 1854; the Hammersmith and City Railway Act, 1861; the Hammersmith and City Railway Act, 1865; the Great Western Railway Additional Powers Act, 1865; the Great Western Railway (Various Powers) Act, 1867; the Great Western Railway Act, 1869.

The agreements made on the following dates, namely, June 27, 1861; November 29, 1861; February 9, 1864; February 19, 1864; April 30, 1864; January 14, 1865; June 24, 1867; August 10, 1868.

Upon the further hearing of the case in the King's Bench Division, the Divisional Court (Darling, Avory, and Atkin JJ.) held, apart from any question of competition, that quarter sessions were wrong in holding that they were not entitled to have regard to the contributory value of the lines as a feeder. They accordingly reversed the decision of the quarter sessions and restored the assessments appearing in the valuation lists. The decision of the Divisional Court was affirmed by the Court of Appeal by a majority (Kennedy and Phillimore L.JJ., Buckley L.J. dissenting) on the ground that the case was covered by the decision of the Court of Appeal in *East London Railway Joint Committee* v. *Greenwich Union Assessment Committee.* (1)

(1) [1913] 1 K. B. 612.

1915. June 21, 22, 24, 25. *Balfour Browne, K.C.*, and *Ryde, K.C.* (with them *Konstam*), for the appellants. In rating railway property two principles are applied. Where the thing to be rated is a portion of the railway which does not directly contribute to the profits, such as a station, or a receiving house, or a bunch of sidings, it is rated on a valuation of the accommodation. On the other hand, with regard to running lines, the earnings in the parish are taken as the measure of the rent which the hypothetical tenant would give. In this case the only element to be looked at is the earnings of the segment of railway in the particular parish.

The respondents rely upon contributory value, but that has been ruled out by *Great Central Ry. Co.* v. *Banbury Union.* (1) The Court of Appeal decided that case on the contributory value principle, and that was overruled by the House of Lords. The decision of the Court of Appeal in this case has proceeded upon a misapprehension of *East London Railway Joint Committee* v. *Greenwich Union Assessment Committee* (2), in which the principle of the *Banbury Case* (1) was held to be inapplicable. In the *East London Case* (2) the question was as to the rating of the Thames Tunnel, which was a link line joining up the systems of six different companies, and was leased in perpetuity to a joint committee of the six companies at a minimum rent of 30,000*l.*, and all the profit was to go to the lessors. The line was worked at a loss, and the actual rent was not there set up as a criterion of the rateable value. The basis of the decision in that case was that this was not a profit-earning line at all, but was really an exchange siding, and ought therefore to be rated on a valuation of the accommodation. That has no application to the present case. Nor does any question of competition arise in this case, since that would involve repealing a series of Acts of Parliament. On the facts these lines fall to be rated on the profit-earning principle, and they were properly assessed by quarter sessions at a nominal value as agricultural land in accordance with the usual practice. [They also referred to *North and South Western Junction Ry. Co.* v. *Brentford Union Assessment Committee.* (3)]

(1) [1906] 1 K. B. 597; [1907] 1 K. B. 717; [1909] A. C. 78.

(2) [1913] 1 K. B. 612.

(3) (1887–8) 18 Q. B. D. 740; 13 App. Cas. 592.

H. L. (E.) 1915

GREAT WESTERN AND METROPOLITAN RAILWAY COMPANIES v. KENSINGTON ASSESSMENT COMMITTEE.

SAME v. HAMMERSMITH ASSESSMENT COMMITTEE.

Ernest Page, K.C., and *Courthope-Munroe, K.C.*, appeared for the Hammersmith Assessment Committee; and *Courthope-Munroe, K.C.*, and *Sydney G. Turner* for the Kensington Assessment Committee. The case for the respondents was argued by

Ernest Page, K.C., and *Courthope-Munroe, K.C.* (1.) The question of contributory value is not concluded against the respondents by the *Banbury Case.* (1) In that case the only question at issue was whether the line in question should be assessed on its actual net earnings in the usual way or whether the interest on the cost of construction should be taken into account, and as a decision that case only determined that interest on the cost of construction was not the right measure of the rent which a hypothetical tenant might reasonably be expected to pay. There was no decision by the House that contributory value must be disregarded. Lord Dunedin's observations on this point are obiter only, and the inquiry, which his Lordship regarded as hopeless, namely, how the values between the different parishes ought to be adjusted on the contributory value basis, was not regarded by Lord Campbell in *South Eastern Ry. Co.* v. *Dorking Union* (2) as hopeless at all. There is nothing in the *Banbury Case* (1) to overrule a long series of authorities extending over eighty years to the effect that a branch line may be assessed at something beyond its local earnings by reason of the advantage which it gives to the main line as a feeder. Accepting the *Banbury Case* (1) as a binding authority on the question of contributory value, this case falls within one or other of the exceptions mentioned by Lord Loreburn. This is an auxiliary line which is in no sense an integral part of the main system of either of the appellant companies.

(2.) The line has a competitive value as between the appellant companies. By the agreements and Acts of Parliament the Hammersmith and City line had a right in perpetuity to have its traffic taken over the Great Western Railway from Westbourne Park to Bishop's Road, the junction with the Metropolitan Railway. If the Metropolitan Railway became tenants of this railway the tenancy would comprise the railway with all its rights, including the running powers over the Great Western Railway, and in that event

(1) [1909] A. C. 78. (2) (1854) 3 E. & B. 491.

it has been found by quarter sessions that the Metropolitan would become competitors with the Great Western. The dissolution of the existing partnership does not affect the question, since the whole thing is hypothetical.

Balfour Browne, K.C., replied.

The House took time for consideration.

1915. July 28. LORD BUCKMASTER L.C. My Lords, the question for decision by your Lordships' House has been raised by two appeals which have been heard together. In both cases the Great Western and the Metropolitan Railway Companies are the joint appellants and in one the assessment committee of the borough of Hammersmith and in the other the assessment committee of the borough of Kensington are the respondents.

The appeals arise out of the decision of the London Quarter Sessions, who have assessed for rating purposes the gross value of that part of the appellants' railway lines which is contained in the parish of Hammersmith at the sum of 200*l.* gross and 100*l.* net, and that part in the parish of Kensington at 120*l.* gross and 60*l.* net. These assessments are entirely independent of the assessment of the stations, carriage sheds, and their appurtenances, coal yards, stone yards, buildings and arches. They relate to the line and railway track, and have been fixed by considering only the actual amount of profit earned in each parish by the section of the line contained within its boundaries. It is not disputed that if this principle be right the assessment is accurate. The Court of Quarter Sessions have, however, also found as a fact that if the annual value of the property in question be determined by considering, not merely the profits earned in the parish, but the value of the lines in the parish to the appellants, due to the fact that the lines feed other portions of the appellants' undertaking, thereby enabling profits to be earned by traffic which does not pass over the lines in question, the assessments ought to be, as to the portion in Hammersmith, 9780*l.* gross and 4890*l.* rateable, and as as to the portion in Kensington, 3900*l.* gross and 1950*l.* rateable. These figures again are not in dispute if the principle on which they depend be accepted, and, upon the appeal of the assessment

H. L. (E.) 1915

GREAT WESTERN AND METROPOLITAN RAILWAY COMPANIES v. KENSINGTON ASSESSMENT COMMITTEE.

SAME v. HAMMERSMITH ASSESSMENT COMMITTEE.

Lord Buckmaster L.C.

committees, they have been adopted by the Divisional Court, whose judgment has been confirmed by a majority of the judges in the Court of Appeal.

The two sections of the lines in the two parishes form very nearly the whole length of a railway, now jointly owned by the appellants, one terminus of which is at Hammersmith, while the other joins the Great Western Railway close to Westbourne Park, the said lines being also connected by two short spur lines with the West London Railway and the London and South Western Railway respectively. This railway was constructed by the Hammersmith and City Railway Company under an Act of Parliament passed in 1861. It was opened on June 13, 1864, and was originally worked by the appellant companies under an agreement made between them and the Hammersmith and City Railway Company. The railway itself was ultimately conveyed to the present appellants jointly by a conveyance dated June 24, 1867, and in the same year the Hammersmith and City Railway Company was dissolved by an Act of Parliament which contained a provision that the railway should vest jointly in the appellants, and should be worked under the joint management of a committee of five people, two of whom were appointed by each of the appellants, the fifth being an independent person. The position so established of the appellants in relation to the railway has continued unchanged to the present time.

The railway itself possesses no characteristics that distinguish it from an ordinary suburban railway line, but the special circumstances under which it was constructed and the special conditions under which it is now worked are relied upon by the respondents for the purpose of showing that its annual value can only be properly ascertained by taking into consideration the increase of profits earned by the appellant companies on other portions of their undertaking by means of the facilities which the railway affords. The respondents also urge that if this contention be neglected they are still entitled to have the rateable value fixed by considering a competitive rent determined by considering each of the two appellant companies as competitors. These points and the general question of whether the method adopted by the Court of Quarter Sessions is the right one to adopt in the absence of special circumstances are the points raised for decision.

The difficulties with which the assessment committees were confronted in this case must always occur wherever it is attempted to value for rating purposes part only of an extensive undertaking like that of a railway company. It is due to the language of rating statutes, the one applicable to the metropolis being the Valuation (Metropolis) Act of 1869, which by s. 4 defines gross value in the following terms: "The term 'gross value' means the annual rent which a tenant might reasonably be expected, taking one year with another, to pay for an hereditament, if the tenant undertook to pay all usual tenant's rates and taxes and tithe commutation rentcharge, if any, and if the landlord undertook to bear the cost of the repairs and insurance, and the other expenses, if any, necessary to maintain the hereditament in a state to command that rent." This standard of value can be readily applied to ordinary house property, or, indeed, to any undertaking entirely contained within the boundaries of one rating authority; but when the subject of consideration is the property of a railway company, whose lines thread through numbers of parishes, its application is far from simple. Nevertheless, it must be remembered that the sole standard is the standard of rent payable for the use and occupation of the particular property by a tenant from year to year. Different methods may be adopted for the purpose of arriving at this rent, and no one method would necessarily be wrong because another might have been used. They may even vary with the different circumstances and conditions existing in different localities. It may, for example, be possible in one parish to ascertain the annual rent for a portion of a railway by considering the fact that a rent is actually paid for the piece of line in question. It may be possible in another to show that the presence of various companies, seeking in rivalry to obtain possession of the line, gave an additional element of value to the rent that would be paid; or, again, it may be that the actual and special character of the lines themselves might require a standard of value wholly inapplicable in other cases. Whatever method be adopted, it must be used in relation to existing facts. The phrase "hypothetical tenant," which has for a long time described the character of the tenancy, must not be allowed to introduce the idea of creating hypothetical competitors or hypothetical circumstances by which to fix the rent. Further,

H. L. (E.) 1915

GREAT WESTERN AND METROPOLITAN RAILWAY COMPANIES v. KENSINGTON ASSESSMENT COMMITTEE. SAME v. HAMMERSMITH ASSESSMENT COMMITTEE.

Lord Buckmaster L.C.

although the actual occupier may properly be regarded as a possible tenant, this fact must not be used so as to base the valuation on an extortionate rent fixed by reference to his special necessities. For instance, if a man's house were in one parish and his front garden in another, the rateable value of the garden should not be ascertained by considering how much the owner of the house would be compelled to pay in order to obtain access to his own front door.

In the present case, it has been found in plain terms by the Court of Quarter Sessions that apart from treating the appellants as competitors there would be no value in this line due to competitive candidates for its use, and that, in order to introduce the element of competition as between the appellants themselves, it would be necessary to assume the dissolution of the arrangement now existing and made binding by statute, and the restoration, or rather the creation, of special rights of user and cross traffic over the Great Western line between Bishop's Road and Westbourne Park by the tenant of the line. Such considerations depend upon the assumption as facts of conditions that do not exist and may never arise, consequently they cannot be entertained, and the question therefore of a value attributable to competition may be disregarded. Again, there are no special circumstances associated with the structure, use, or character of the line to distinguish it from an ordinary arm of a railway system. I have already stated the facts relating to the history and user of the line. It was constructed by one company, worked in unison by the two appellants, the construction company was dissolved and the line vested by conveyance confirmed by statute in the appellants and is now managed by a joint committee for their joint benefit. There is nothing in these facts to require any special method of valuation, and the case therefore is reduced to a consideration of the simple problem of whether on the one hand the annual value built up by considering the actual profits earned, or on the other the value due to the fact that the line helped to increase the profits on other parts of the appellants' system, ought to be taken as a standard for measuring the rent. So regarded, it appears to me that the reasoning that was adopted by your Lordships' House in deciding the case of *Great Central Ry. Co.* v. *Banbury Union* (1), which I will refer to

(1) [1909] A. C. 78.

for the sake of brevity as the *Banbury Case*, shows that the former of the two methods is correct. It is true that in that case the exact contrast now presented to your Lordships cannot be found, but the underlying principle of the decision applies to both cases with equal justice. There the dispute was between the same method as that adopted here by the Court of Quarter Sessions and an arbitrary value fixed by considering the interest payable on the cost of construction. It was decided by your Lordships that this latter consideration should not be entertained and that there was no reason for departing from a method which in ordinary circumstances was the right one to apply. This is, I think, shown clearly in the speech of Lord Loreburn at p. 85, where he says : " But, it was said, the present case is out of the ordinary, because this particular line, including the portion of it within Wardington parish, has a value apart from the actual net profits earned on it, and either the Great Central Railway Company or the Great Western Railway Company might reasonably be expected to give a greater rent for it as a means of connecting their systems, which otherwise could not be effected. And so, it was argued, interest on the cost of construction is an element which might properly be taken into account in ascertaining the rateable value, for it shews what the railway company would give as rent." Now it is plain from this statement that although in that case the special fact to which regard was sought for ascertaining the value was the interest on the cost of construction of the line, yet it would have been just as pertinent to the inquiry to have urged that the increased rent was due to the added facilities which the piece of line in dispute gave to the Great Central Railway Company, and it appears from the report that this was one of the arguments in fact advanced. Such contentions were, however, rejected for reasons that, it appears to me, apply with equal force to the present case. Indeed, both the learned judges in the Court of Appeal who have decided against the appellants would have considered themselves bound by the *Banbury Case* (1) to have decided in their favour but for a later authority of *East London Railway Joint Committee* v. *Greenwich Union Assessment Committee*. (2) Phillimore L.J. says that he regards the reasoning in the *Banbury Case* (1) as conclusive, and Kennedy L.J. makes the

(1) [1909] A. C. 78.

(2) [1913] 1 K. B. 612.

H. L. (E.) 1915

GREAT WESTERN AND METROPOLITAN RAILWAY COMPANIES v. KENSINGTON ASSESSMENT COMMITTEE.

SAME v. HAMMERSMITH ASSESSMENT COMMITTEE.

Lord Buckmaster L.C.

following statement to the same effect: "I have no hesitation in saying that, in view of the divergence of judicial opinion which appears in the earlier cases, if we had to decide the present appeal without having to consider any later authority than the *Banbury Case* (1), I should feel not that I was bound—for the point which the House of Lords was asked to decide in the *Banbury Case* (1), and did there decide, was not the point which we have to decide here—but that I was right in applying the principle which in the course of the judgments delivered in that case was approved, and in giving judgment, therefore, in the present case for the appellants." In my opinion the learned judges created for themselves the fetters by which their judgment was constrained. The opinions expressed in your Lordships' House in the *Banbury Case* (1) stated in clear terms that the ordinary way of arriving at the value of a piece of railway line in a parish was the way by which the Court of Quarter Sessions in this case travelled to the decision that the Courts below have set aside, but it was also made plain that there might be exceptional circumstances, as, for example, the actual rent of a piece of line rented by the company as auxiliary to but not really forming part of its system, or the occupation by a number of companies of a piece of line, or other circumstances of which these two instances are nothing but illustrations, which would prevent the application of the general rule. In the *East London Case* (2) these special circumstances were found to exist. The piece of line in question was a link joining up the systems of six railway companies. It had been constructed by the East London Railway Company, and had been leased in perpetuity to the six railway companies on terms which provided that the rent should be equal to 56 per cent. of the gross receipts with a minimum of 30,000*l.* to be increased in certain contingencies. A portion of this line ran through the parish of St. Paul, Deptford, and the assessment committee for that district assessed the East London Railway Company in respect of such line at a gross value of 4624*l.* and a rateable value of 2326*l.* Similar assessments were made in respect of other portions of the line in other parishes in the boroughs of Bermondsey and Stepney, and appeals were brought against all such assessments on the ground that there was an actual deficit in working the line

(1) [1909] A. C. 78. (2) [1913] 1 K. B. 612.

and that it was on its own earning capacity only that the assessment should be based. The Court of Quarter Sessions, although they varied the assessment, rejected this contention, and fixed the assessment in the parish of St. Paul, Deptford, at 1995*l.*, and in the boroughs of Bermondsey and Stepney at 1368*l.* and 639*l.* respectively, and these assessments were affirmed by both the Divisional Court and the Court of Appeal.

The judgment of the learned judges in the Court of Appeal, however, appears to me to have depended upon the special circumstances to which I have referred, and to which no weight is given by Phillimore L.J. or Kennedy L.J. in comparing that decision with the decision of this House. Lord Sumner, who was then Hamilton L.J., in particular, in giving judgment in the *East London Case* (1), said, at p. 627 : " I think that such a case as the present is one of those expressly reserved by Lord Loreburn in the *Banbury Case* (2) for future consideration " ; and again at p. 628 he adds : " It may usually be the most convenient and proper formula to measure the value of a link in a line of railway by reference to the net receipts attributable to traffic carried over it ; but I cannot think that it must in law be wrong for the sessions to hold that there are cases in which such a formula is not alone nor exhaustively applicable, cases where, apart from or in the absence of any such receipts, the line may be attractive to a hypothetical tenant, simply as a short cut, facilitating the general working of the line, as exchange sidings do, or as the accommodation of a specially rented passenger platform in alieno solo might be supposed to do, though nothing could be specially charged for it as for a terminal service. The sessions have held that this is one of such cases. If this is so, all the other contentions of the appellants would be insufficient for success in this appeal, because, as there is evidence that position and connections result in an accommodation value leading a hypothetical tenant to offer a rent, it is peculiarly for the Court of Quarter Sessions to draw its own conclusion as to the value of such accommodation." And with this judgment the Master of the Rolls agreed.

It therefore appears that the *Banbury Case* (2) was accepted as having laid down a clear general rule to which there might be

(1) [1913] 1 K. B. 612. (2) [1909] A. C. 78.

H. L. (E.) 1915

GREAT WESTERN AND METROPOLITAN RAILWAY COMPANIES v. KENSINGTON ASSESSMENT COMMITTEE.

SAME v. HAMMERSMITH ASSESSMENT COMMITTEE.

exceptions due to a variety of special circumstances, and with this view I am in entire agreement, but having carefully examined the facts in this case I cannot find that any such special circumstances exist.

For these reasons I think the appeal should be allowed, the judgments of the Courts below should be reversed, and the assessment of the Court of Quarter Sessions restored.

LORD ATKINSON. My Lords, I concur.

The question for decision is whether the assessment committee were wrong in point of law in the course they took. The facts have been already stated.

The Hammersmith and City Railway is about three miles in length. It runs from Hammersmith, where it is connected by two short spur lines with the West London Railway and the London and South Western Railway, to Westbourne Park, where it is connected with the Great Western Railway, and this latter railway is connected at Bishop's Road with the Metropolitan Railway running to Liverpool Street.

The result of all these connections is that traffic coming to the city of London from the Hammersmith district passes over the Hammersmith and City line from Hammersmith Station to Westbourne Park, over the Great Western Railway from Westbourne Park to Bishop's Road, and over the Metropolitan Railway to and from Bishop's Road to Liverpool Street. And the returning traffic from the City to the Hammersmith district runs in the reverse order. Thus each of these railway lines feeds and is fed by the other. Each contributes to the traffic passing over the other quite as truly as the traffic over any section a mile in length of the main trunk line of the Great Western Railway feeds and is fed by the traffic passing over the portions of the main line with which the ends of the section are connected. It would be an obvious error to credit any section of the Hammersmith line with the traffic it contributes to any other section or other sections without debiting it and crediting them with the traffic they contribute to it. If the principle of contributive value is to be applied to each parochial section of this line it must be credited with the profit it causes to be reaped beyond its own limits. I quite concur with Buckley L.J. in thinking that when the profits

earned on each section are taken, in the manner suggested in the *Banbury Case* (1), as a basis for estimating what reasonable rent a hypothetical tenant might be expected to pay for that section as tenant from year to year, the traffic each section contributes to the other, so far from being excluded from consideration, is, on the contrary, taken into consideration in the most just and equitable manner, namely, this, that the aggregate amount of the contributive value of each section is spread over the whole line.

The Hammersmith and City line was made under an Act of 1861, and, as usual in such cases, was managed by a joint committee. This case therefore differs essentially from the *Brentford Case* (2) in this, amongst other things, that nothing exists in the present case resembling the continued and active existence of the company which made the line, and subsequently leased it, relied upon in the judgment in the Court of Appeal to show that the line so leased was not absorbed into the lines of the lessees so as to become an integral part of those systems.

The appellants own and occupy this Hammersmith and City line. They work it in connection with their own lines to carry through traffic both ways over all the three. Their relation to it is precisely the same as if they had made it themselves. And I fail to see how it aids in any way to the solution of the question to be decided to designate it as a feeder or a branch line. Every line other than the main trunk line of a railway is, I suppose, in one sense a branch line, but it would be difficult to contend that if the line of the London and North Western Railway Company from Euston to Holyhead, for instance, be taken as the main trunk line, the lines of that company from Crewe to the north are not an integral part of its system. The system of valuing separately the strip of line lying in each parish of a railway running through several parishes—the parochial system, as it is called—was, according to the judgment of Coleridge J. in *Reg.* v. *London, Brighton and South Coast Ry. Co.* (3), so long ago as 1851, and *Rex* v. *Inhabitants of Kingswinford* (4), decided to have its origin in the statute 43 Eliz. c. 2.

The modern railway system, however, is something like two

(1) [1909] A. C. 78.
(2) 18 Q. B. D. 740 ; 13 App. Cas. 592.
(3) (1851) 15 Q. B. 313, at p. 358.
(4) (1827) 7 B. & C. 237.

H. L. (E.) 1915

GREAT WESTERN AND METROPOLITAN RAILWAY COMPANIES v. KENSINGTON ASSESSMENT COMMITTEE.

SAME v. HAMMERSMITH ASSESSMENT COMMITTEE.

Lord Atkinson.

centuries and a half younger than that statute, and I suppose one may without irreverence express one's thorough concurrence in the opinion expressed by Lord Campbell in the year 1851 in the case of *Reg.* v. *Great Western Railway* (1), to the effect that the rule laid down in the Parochial Assessment Act of 1836 (6 & 7 Will. 4, c. 96), s. 1, "easily applicable to all the property which the Legislature had in contemplation at the time it laid it down . . . . is wholly inapplicable to a railway extending many miles through many parishes, with a trunk line and branches, the traffic on different sections varying materially, and the expense of working these different sections bearing no certain proportion to the earnings upon them." The noble Lord proceeded to add: "At all events we must proceed upon the most improbable and nearly absurd supposition, that a person may be found who would take the portion of the railway which passes through a single parish, and no more, as tenant from year to year." And he then expresses the hope that Parliament may lay down rules applicable to the rating of this then novel and important species of property, both simple and equitable in their nature, which would effectually put an end to all litigation on the subject. Well, so far as England is concerned that hope has not been realized. In Scotland and Ireland Parliament has established systems of rating railways which, I have always understood, appear to the parties concerned to be more simple, equitable, just and rational than the system which Lord Campbell criticized. While, however, the parochial system remains unreformed and in force it must be applied with the aid of some most difficult imaginings, and each parochial section of a line must be separately valued; but, to use Lord Halsbury's language in the *Brentford Case* (2), "the thing is to be valued as it is, for the purpose for which it is used." Before the Court of Appeal the point as to the competitive value of each parochial section was not argued, but kept open. It was argued before your Lordships.

In the case as originally stated, the justices found as a fact (paragraph 13 (3.)) that the evidence offered by the respondents had not satisfied them that there were competitors who could be ascertained as such, and would be willing to pay a rent for the tenancy of the two parochial lines.

(1) (1851) 15 Q. B. 379, at p. 397. (2) 13 App. Cas. 592.

In the further special statement of fact they state that at the hearing (i.e., the original hearing) they decided that there was no competition with the Great Western Company, but in doing so left out of consideration the Metropolitan Company which was in partnership with the former, and then decided that if two things happened which have not happened, may never happen, and which neither company can necessarily bring about, the Metropolitan Railway Company might be a competitor of the Great Western Railway Company. These two things were that the partnership existing between the two companies should be dissolved, and that running powers should be given to the Metropolitan Railway Company over the line of the Great Western Company from Bishop's Road to Westbourne Park.

It is scarcely necessary to point out that these things could only be done by statute, and it would be wholly illegitimate to find that a section of a line of railway has now a competitive value because it might, if existing conditions were radically changed by legislation, have that value.

The additional finding of the justices amounts in effect to a finding that "as these sections of line now stand, and as they are now used, they have no competitive value." I followed with interest the argument addressed to your Lordships by Mr. Page, on behalf of the respondents, in support of this point as to the existence of competitive value. I apologize, in advance, if I do him any injustice, but as I understood it, his contention amounted to this: the cases have decided that rating authorities may assume that companies which own, occupy, and work their own lines do not occupy or work them, but would be willing to become tenants from year to year to themselves of their own property at a reasonable rent. In other words, that these owners may be regarded as possible hypothetical tenants within the meaning of the statute, and that the body which may legitimately suppose these things is qualified and entitled to suppose that Parliament has done something which it may never do, and which no person or body can compel it to do. The answer to that argument is, I think, this, that if by the wording of the Assessment Act, as interpreted in the cases, rating authorities are forced to proceed upon one improbable and nearly absurd supposition (to use Lord Campbell's words), it by no means

H. L. (E.)
1915
GREAT WESTERN AND METROPOLITAN RAILWAY COMPANIES v. KENSINGTON ASSESSMENT COMMITTEE
SAME v. HAMMERSMITH ASSESSMENT COMMITTEE.
Lord Atkinson.

follows that they are entitled to proceed upon every other improbable and absurd supposition which may take their fancy, but which they are not constrained by statute or otherwise to proceed upon.

It was also urged on behalf of the respondents that as it was found by the quarter sessions (paragraph 14 (3.)) that a contributive value did in fact exist, they were bound to take it into account. The answer to that contention, in my view, is that on taking the profits earned on each section as the basis of assessment of that section, they have already taken into account to the credit of the section its proper proportion of the value which every section of the line contributes to every other section. I do not think it is legitimate to regard the actual point decided in the *Banbury Case* (1), and ignore the ratio decidendi. The case is, in my view, an authority for the proposition that where the profits of a section of a line are taken as the basis of its assessment, contributive value is to be excluded as an addition to the value thus fixed. I concur with Buckley L.J. in thinking that if sub-paragraphs (1.), (3.), and (4.) of paragraph 14 be taken together, they show that the quarter sessions were of opinion that, if not bound under the circumstances to include in the valuation of each parochial section the extra profits earned by it, but reaped in other sections, they ought not to include them. In my opinion they were not bound to include them. In short, I concur with Buckley L.J. in omnibus. I think the conclusion he arrived at was sound, and the reasoning by which he arrived at it convincing. The Lords Justices who formed the majority of the Court expressly stated that they too would have concurred with Buckley L.J. had they not thought that the *East London Case* (2) was undistinguishable from this case, and that being a decision of the Court of Appeal, they were bound by it.

In that case the joint committee of six different railway companies were lessees in perpetuity of a certain section or sections of the line of a seventh company joining up the several systems of the six, at a rent equal to five-sixths of the gross profit of the portion leased with a minimum of 30,000*l.* per annum.

It was stated in argument by Mr. Balfour Browne, and, as I understood, not disputed, that if any net profit was realized by the

(1) [1909] A. C. 78. (2) [1913] 1 K. B. 612.

lessees after paying this rent and the cost of working the line demised, they were bound by their lease to hand it over to the lessors. For many years the working of the line on the terms of the tenancy had resulted in a loss, and from 1907 the working expenses exclusive of the rent had exceeded the receipts. It was not contended that the rent of 30,000*l.* per annum represented the rateable value of the line demised. In the quinquennial valuation list of 1905 the portion of the line running through the parish of Deptford was assessed at the sum of 5624*l.* gross and 3336*l.* rateable value. The quarter sessions took the figures of 1905 as the basis of calculation for 1910, and after taking into account what were described as extraneous circumstances, such as the "position, connections, and accommodation of the section of the line," fixed the rateable value of it at 1995*l.* The joint committee appealed on two separate grounds, (1.) that the section in Deptford parish should, on the principle of the *Banbury Case* (1), which they contended applied, be assessed at a nominal sum; and (2.) that the Court of Quarter Sessions were wrong in taking into consideration the above-mentioned extraneous circumstances. The Court of Appeal held that the *Banbury Case* (1) did not apply, and that the quarter sessions were not debarred from taking into account these extraneous circumstances.

That case was, I think, entirely distinguishable from the present. The leased line belonged to a lessor still in existence. It could not in any sense of the term be regarded as an integral portion of any of the lines of any of the railway companies represented by the joint committee, or by all of them combined. No direct profit could ever be realized by the lessees out of it, though of course it might, notwithstanding this latter, be rated if the occupation of it was beneficial. Its only value to the lessees was the accommodation it afforded for exchanging their traffic, and it resembled much more an exchange siding than a running line with stations, &c., upon it, such as the Hammersmith and City Railway. This was the accommodation which was in fact rented, at a rent which, as circumstances turned out, would appear to be extravagant. And all that was in fact decided was, I think, that the quarter sessions might hold that the reasonable rent which a hypothetical tenant

(1) [1903] A. C. 78.

H. L (E.) 1915

GREAT WESTERN AND METROPOLITAN RAILWAY COMPANIES v. KENSINGTON ASSESSMENT COMMITTEE.

SAME v. HAMMERSMITH ASSESSMENT COMMITTEE

might be expected to pay was to be paid for the same thing for which the actual rent was paid. I fail, therefore, to see how it can be held that the decision in that case rules the present case. In my opinion the assessment committee were wrong in point of law in the course they took ; the decision appealed from was I think wrong and should be reversed, and this appeal be allowed with costs.

LORD PARKER OF WADDINGTON. (1) My Lords, the difficulty of this appeal arises, I think, largely from the form in which the special case has been stated by the quarter sessions.

The problem in all rating is to arrive at the sum which a tenant would give by the year for the privilege of occupying the property in question. In the case of an ordinary property, such as a dwelling-house, it may readily be conceived as offered in the open market for lease by the year, and there is no great difficulty in estimating its annual value on the basis of market competition, more especially if the estimate can be verified by the actual yearly rentals of similar houses in the same neighbourhood. But in the case of a railway running, as it usually does, through many rating areas, the problem presents more difficulty. Except under special circumstances one cannot easily imagine a small section of railway being offered for lease by the year and there being any market competition for its occupation, and there is little possibility of verifying any estimate, if made, by comparison with the actual rentals of similar properties. Hence the method usually adopted is to estimate the rent which a tenant would pay for the section of line in any particular rating area by reference to the profits of the system earned in that area. It must, I think, be taken as finally settled by your Lordships' House in the *Banbury Case* (2) that if this method be adopted only the actual profits earned in the area can be taken into account. It is not permissible to treat these profits as enhanced by reason of the fact that the section of line in question serves as a feeder to other parts of the system, and increases the profits earned on those other parts. The reason is that these increased profits are rated in other areas, and ought not, in fairness to the railway company, to be rated more than once. It is true that the actual decision in the *Banbury Case* (2) was on a different point, but the ratio decidendi clearl

(1) Read by Lord Sumner. (2) [1909] A. C. 78.

covers the point in question. The *East London Case* (1) has no bearing on the matter. As was said by Lord Halsbury in the *Brentford Case* (2), the profit basis of calculation is not in every case obligatory; there may be cases in which the rent which the hypothetical tenant would pay can best be ascertained in another way. The *East London Case* (1) was one of these cases. It was, under the peculiar circumstances, possible to ascertain the annual value on the basis of market competition. On the other hand, the profit basis was inapplicable, if only because the railway companies concerned were by the terms of the lease under which they held the section of line in question, in effect, precluded from making a profit. Any profit they might earn went to the owner of the section by way of increased rent.

My Lords, the first question submitted by the quarter sessions for the opinion of the Court is whether they were right in holding that in ascertaining the value of the section of railway in question the same must be assessed solely with regard to the actual earnings within the parish. If this question asks whether in assessing the section on a profit basis the quarter sessions could take into account any profits earned outside the parish by reason of the section in question acting as a feeder to other parts of the system, it is already answered by the *Banbury Case* (3), and the quarter sessions were right. On this footing there is nothing further to be said, for clause 18 of the special case provides that if the quarter sessions were right in so holding their decision is to stand. It was, however, contended in argument that the real meaning of the question is whether the profit basis was the only basis of assessment which could under the circumstances be adopted. This interpretation was said to be borne out by the second and third questions submitted to the Court. The second question is whether the quarter sessions were right in holding, on the facts stated in the special case, that they were not entitled to have regard to certain evidence of competitive value in respect of the section to be rated, and the third question is whether the quarter sessions were right in holding that they were not entitled to have regard to the contributory value of the section as a feeder to other parts of the system of either or

(1) [1913] 1 K. B. 612. (2) 13 App. Cas. 592.
(3) [1909] A. C. 78.

H. L. (E.) 1915

GREAT WESTERN AND METROPOLITAN RAILWAY COMPANIES v. KENSINGTON ASSESSMENT COMMITTEE.

SAME v. HAMMERSMITH ASSESSMENT COMMITTEE.

Lord Parker of Waddington.

both appellants. It was argued that competitive value and also contributory value, according to the *Banbury Case* (1), being immaterial if the profit basis were adopted, these questions must have reference to some other basis of assessment, and that the first question must therefore mean to ask whether the profit basis was, under the circumstances, the only basis which could be adopted. There is, I think, a good deal to be said for this view, especially as the 19th clause of the special case provides that if the Court be of opinion that the quarter sessions were wrong as to the first question and also wrong as to one or other of the second and third questions, the values in the valuation list appealed from are to stand. It will be convenient, therefore, to proceed at once to a consideration of the second and third questions.

My Lords, the second question, as well as the first, appears to me to involve considerable ambiguity. It may be designed to ask whether evidence of competitive value is inadmissible whatever basis of assessment be adopted. If this be the true construction, the answer must clearly be in the negative. If the basis adopted be the market value under the influence of competition, evidence of the sort must necessarily be admissible. When, however, the special case is examined, it will be found that the quarter sessions not only admitted the evidence in question, but gave a decision as to its effect. They find that the evidence offered by the respondents has not satisfied them that there are competitors who can be ascertained as such, and who would be ready to pay a rent for the lines in question; in other words, that in ascertaining the rent which the hypothetical tenant would pay, competition was not under the circumstances an element to be considered. The second question must therefore, I think, mean to ask not whether the evidence was admissible, but whether it was sufficient to justify the finding that there was no competitive value. So construed the question admits only of an affirmative answer. It is to be observed that the Court of Appeal remitted the special case to the quarter sessions for restatement by showing whether, if the section of line to be assessed were in the market, the possible competitors for its occupation, including the Great Western and Metropolitan Railway Companies separately, as well as jointly, and any other

(1) [1909] A. C. 78.

competitors, would give a rent ascertained on the principle of the Parochial Assessment Act sufficient to support the rate. As I read the further statement of the quarter sessions, they find that, except on certain suppositions which your Lordships have no business to make, there would be no competition to become tenant of the section of line in question; in other words, that in ascertaining the rent which the hypothetical tenant would be prepared to pay, there is no element of competition which can be taken into account; in fact, no competitive value. I am of opinion, therefore, that the second question in the special case must be answered in the affirmative.

Passing to the third question, it seems at first sight to ask once again the question answered by the *Banbury Case* (1), but having regard to what I have already said, I think it must be meant to raise the following point. Supposing (1.) that the profit basis of assessment be rejected, and (2.) that as found in the special case there be no possibility of adopting the basis of market competition because of the absence of any possible competitors, is it under these circumstances permissible, in estimating the rent which the hypothetical tenant would pay for the section of line in question, to have regard to the fact that this section acts as a feeder to, and increases the profits earned by, the appellants on other parts of their railway system? I cannot doubt that the answer to this question so stated ought to be in the negative. If it were not so the same profits would be in effect rated twice, and this would involve the very same hardship which lay at the root of the decision in the *Banbury Case.* (1)

My Lords, having come to the conclusion that the quarter sessions were right on the points raised in the second and third questions, it remains to consider the first question on the footing that it asks whether the basis of profit was, under the circumstances, the only basis which the quarter sessions were at liberty to adopt. In my opinion it was. The special case suggests three methods of assessment only. I will recapitulate them. The first is the profit basis, from which contributory value is excluded by the *Banbury Case.* (1) The second is the competitive market value, and the third is what I may call the basis of contributory value only. If

(1) [1909] A. C. 78.

BIBL. LONDIN UNIV.

H. L. (E.) 1915

GREAT WESTERN AND METROPOLITAN RAILWAY COMPANIES v. KENSINGTON ASSESSMENT COMMITTEE.

SAME v. HAMMERSMITH ASSESSMENT COMMITTEE.

the second be inapplicable because on the facts there are no possible competitors, and the third be inapplicable because of the law, there is only the first to fall back upon. No possible fourth method has been suggested.

Under these circumstances I think the appeal succeeds, and that the decision of the quarter sessions ought to stand. The respondents should pay the appellants' costs both here and in the Courts below.

EARL LOREBURN. (1) My Lords, I concur.

The *Banbury Case* (2), in my opinion, is conclusive of this appeal. I agree with the Lord Chancellor in thinking that the *East London* (3) decision may be regarded as proceeding on the special circumstances, and, among other things, on the fact that an actual rent was there available to indicate annual value. Ordinarily I take it that the method of rating the running line by ascertaining profits is now the settled method. It may be that an auxiliary piece of line is not really a part of the system and is worked for the company's benefit at a loss or at a profit below its true value to the system, and that it would be unfair to the parishes containing it that the value should be ascertained merely on profits earned. Or it may be that a piece of line which has not become part of a larger system is occupied by several companies, and from its peculiar situation has a legitimate value somewhat above what may be measured by the profit earned, because there would be willing occupiers at hand ready to pay a good rent, quite apart from the idea of a rent of necessity, which latter can never be entertained. It would be like the case of a house in a good neighbourhood where there is a free market for houses. Or, as in the *East London Case* (3), there may be also an actual rent to throw light on annual value. In other words, there may be cases in which you ought not to base rating on profits, which is a very different thing from saying that you can rate on profits and at the same time throw in what is sometimes called contributive value, or is called competitive value. That cannot be done.

I will only add that such cases are rare, and that it would be wrong in rating a running line to depart from the ordinary method except

(1) Read by Lord Atkinson. (2) [1909] A. C. 78.
(3) [1913] 1 K. B. 612.

for very special circumstances, which ought to be clearly established. For every part of a line assists every other part, and a fair method of rating a railway system would be impossible if exceptional treatment were accorded to a parish in respect of a running line which is part of the system. A Court has to see that the method applied does not expose the company to double rating, and that it is fair to other parishes. The facts of this case and the findings of quarter sessions, when closely examined, show clearly that this is not an exceptional case, and I agree in the motion proposed.

It seems a pity that we should have had to discuss what the questions put to us mean. The better way would be for quarter sessions simply to state the facts, the contentions, and the finding. We have before now declined in this House to answer what were, in effect, carefully prepared interrogatories.

LORD PARMOOR. (1) My Lords, the Hammersmith and City Railway is situate in the boroughs of Paddington, Kensington, and Hammersmith, in the county of London. The railway was constructed under an Act of 1861, and in 1865 a statutory power was conferred on the Hammersmith and City Company to lease or transfer their undertaking to the Great Western and Metropolitan Railway Companies. The undertaking was transferred, and on the passing of the Great Western Railway (Various Powers) Act, 1867, the Hammersmith Company was absolutely dissolved, and thenceforth ceased to exist. The railway is worked by a joint committee constituted in the usual manner, but it is not suggested that the joint committee can be rated as occupiers, and the occupiers for the purpose of rating are the appellants, the Great Western and Metropolitan Railway Companies.

There was some confusion in the argument addressed to your Lordships on behalf of the respondents, as to the distinctive functions of the assessing tribunal and the Courts in a rating case. It is the duty of the assessing tribunal in all cases to determine the rateable value, and so long as the determination is given in accordance with the statutory definition, and without contravening any legal principle, it is final. Within the London area there is a special statutory definition in the Metropolitan Valuation Act,

(1) Read by Lord Atkinson.

H. L. (E.) 1915

GREAT WESTERN AND METROPOLITAN RAILWAY COMPANIES v. KENSINGTON ASSESSMENT COMMITTEE.

SAME v. HAMMERSMITH ASSESSMENT COMMITTEE.

Lord Parmoor.

1869. This definition is more precise than that contained in the general rating Acts, but does not introduce any new principle. The problem, whether inside the London area or outside, is to ascertain what rent a tenant may reasonably be expected to give, taking one year with another, as a tenant from year to year, on the prescribed conditions, and making the prescribed deductions. This problem is in its essence one of fact. In *North and South Western Ry. Co.* v. *Brentford Union* (1) Lord Halsbury says that it is not the function of the Courts to give directions as to the preferable course to follow in valuation, when it is admitted that neither course is in itself contrary to law.

The same noble Lord states clearly and succinctly in *Mersey Docks and Harbour Board* v. *Birkenhead Assessment Committee* (2) the position of an appellant to the Courts in a rating appeal. "Surely those who are complaining of what has been done by the tribunal must establish either that something has been excluded from the calculation which by law ought to be included, or that something has been included which by law ought not to have been included." I think that within this test questions of law are raised in the present case.

The apparent confusion between the decisions of different rating cases mainly arises in not clearly appreciating the statement of facts in reference to which the decisions have been given. In the present case it is all-important whether the Hammersmith and City lines have become an integral part of the systems of the Great Western and Metropolitan Railway Companies, or whether these lines are a separate undertaking belonging to a company of which the independence has been preserved. It has been found in the case that the Hammersmith and City Railway was constructed under statutory powers in 1861, and that the Hammersmith and City Railway Company were subsequently empowered to lease or sell their undertaking to the appellant companies, or either of them, by the Hammersmith and City Railway Act, 1865, and that they ultimately conveyed their undertaking to the appellant companies by an agreement of June 24, 1867. By s. 69 of the Great Western Railway Act, 1867, the undertaking of the Hammersmith and City Railway was vested jointly in the two appellant companies, and the

(1) 13 App. Cas. 592. (2) [1901] A. C. 175.

Hammersmith and City Railway Company was dissolved and ceased to exist. The joint system is carried on by a joint committee of the two companies constituted in the usual manner. The result is that the Hammersmith and City Railway has become an integral part of the systems of the two companies, and that the running lines, the subject-matter of this appeal, have become an integral part of the running lines of the two companies. Accepting this as a correct statement of the relevant conditions, it follows that the case is governed by the case of *Great Central Ry. Co.* v. *Banbury Union* (1), and that it is distinguishable from the cases of *North and South Western Ry. Co.* v. *Brentford Union Assessment Committee* (2) and *East London Railway Joint Committee* v. *Greenwich Union Assessment Committee.* (3) Mr. Balfour Browne fairly admitted that his argument implied that the Hammersmith and City lines had become an integral part of the lines of the Great Western and Metropolitan systems, and Mr. Courthope-Munroe, for the respondents, did not argue that, if this was the case, he could resist the application of the decision in the *Banbury Case.* (1) In the case of *North and South Western Ry. Co.* v. *Brentford Union Assessment Committee* (2) it was essential to the decision of the Court of Appeal that the lines to be rated had not been absorbed in, and become an integral part of, a larger system. Lopes L.J. says in his judgment that the "individuality of the Junction Company as an independent company, and of the undertaking as an independent undertaking, is carefully preserved." In the case of *East London Railway Joint Committee* v. *Greenwich Union Assessment Committee* (3) the East London Company had an independent existence, and the lines to be rated had not been absorbed in, or become an integral part of, the adjoining systems.

My Lords, it would be sufficient to say that the principles involved in the present case cannot be differentiated from those involved in the *Banbury Case* (1), but having regard to the arguments addressed to your Lordships, I would desire to deal shortly with the three points of law which the present case raises.

The second question stated by the tribunal is "whether we were right in holding on the facts above stated that we were not entitled

(1) [1909] A. C. 78.
(2) 18 Q. B. D. 740; 13 App. Cas. 592.
(3) [1913] 1 K. B. 612.

H. L. (E.) 1915

GREAT WESTERN AND METROPOLITAN RAILWAY COMPANIES v. KENSINGTON ASSESSMENT COMMITTEE

SAME v. HAMMERSMITH ASSESSMENT COMMITTEE.

Lord Parmoor.

to have regard to the said evidence of competitive value in respect of the said lines." On the case being sent back for further statement to the tribunal it was found " If the Metropolitan Company, after dissolution of the partnership and becoming a rival, is still to be considered as having running powers over the Great Western line between Bishop's Road and Westbourne Park under the Acts and agreements scheduled hereto, or would obtain such running powers by becoming tenants of the Hammersmith and City line, then I hold that the Metropolitan Company would be a competitor and that the view of the local authority is right." Presumably a contention in this sense was brought forward before the tribunal. In my opinion it should have been rejected as untenable in law. It is a principle in rating assessment that the hereditament should be valued as it stands and as used and occupied when the assessment is made. There is difficulty in the doctrine of a hypothetical tenant, but if to this is added the doctrine of a hypothetical hereditament, the confusion would become hopeless.

I desire to add, to prevent the possibility of misunderstanding, that if the conditions allow the assessing tribunal to have regard to the contributory value of railway lines, as a feeder to the lines of some other system, it is not necessary that there should be competition. No doubt the existence of competition may operate to enhance rateable value. Whether or not competition has this effect in any particular case would be a matter within the discretion of the assessing tribunal.

The third question submitted to the opinion of the Court is " whether we were right in holding that we were not entitled to have regard to the contributory value of the said lines as a feeder to the other lines of either or both of the appellants." I think that the assessing tribunal were right in so holding, and that running lines which form an integral part of two railway systems cannot be regarded as a feeder to either or both of such systems for the purpose of assessing their rateable value. A parochial section of running lines, whether main, branch, or link lines, which are an integral part of a larger system or systems, must be rated as such, and not on the fictitious hypothesis that they might, if independent, contribute as feeders to the other lines of such system or systems. The contributory value which the respondents claim to be regarded in assessing

the rateable value of the lines in question must be clearly distinguished from the contributory value which is necessarily considered whenever a section of running line is rated on the usual method of ascertaining and eliminating profits. All traffic coming from the other lines of either or both of the appellants to the Hammersmith and City lines, and all traffic coming from the Hammersmith and City lines to the other lines of either or both of the appellants, has been necessarily considered and apportioned in fixing the parochial assessment in one or more of the parishes through which the City and Hammersmith lines run. On this point I would refer to a passage in the judgment of Buckley L.J. : " The earnings of each mile of the line are due to, amongst other things, the contributory effect of every other mile of the line. The result of taking the profits earned in the parish as the basis of rateable value is not to exclude the contributory value, but to take the aggregate amount of the contributory value of each mile and to spread it over all the miles of the system."

The only further question asked by the tribunal is " whether we were right in holding that in ascertaining the value for the purposes of rating for the said lines of railway the same must be assessed solely with regard to the actual earnings of the said lines within the parish." It may appear that this question goes too far in using the word " must," but I think that the question is rightly stated, and that, in answering the question, this House will not interfere with the discretion of the assessing tribunal on a question of fact.

That the Hammersmith and City lines must be assessed solely with regard to the actual earnings of the said lines within the parish is the necessary consequence of the answers which have been given to the two questions already considered. Apart, however, from these questions, the answer should be in the affirmative. All sections of an integral system of running lines, whether main lines, branches, or links, are assessable on the same basis, and any departure leads to the inconsistencies and probable injustices described in the opinions expressed by the noble Lords Earl Loreburn and Lord Dunedin in the *Banbury Case.* (1) The usual method of assessment, which by long usage has been applied, is to ascertain the actual earnings of running lines within parish boundaries and then to fix the rateable

(1) [1909] A. C. 78.

H. L. (E.)
1915
GREAT WESTERN AND METROPOLITAN RAILWAY COMPANIES v. KENSINGTON ASSESSMENT COMMITTEE.
SAME v. HAMMERSMITH ASSESSMENT COMMITTEE.

value as the reasonable rental which a tenant from year to year might be expected to give, having regard to these actual earnings and making all necessary deductions. It is said that methods of valuation are matters not for the Courts, but for the assessing tribunal. This, no doubt, is true, but I desire to express the opinion that a method which has long been adopted should not be departed from without good reason, and that in any case there is no room for a different method of assessment within the areas of the two respondent parishes.

My Lords, in my opinion, the appeal should be allowed with costs.

Orders of the Court of Appeal reversed and orders of the County of London Quarter Sessions restored. The respondents in each appeal to pay the costs in the Courts below and also the costs of the appeals to this House.

Lords' Journals, July 28, 1915.

Solicitor for the appellants : *L. B. Page.*

Solicitors for the respondents the Kensington Assessment Committee : *Pontifex, Pitt & Johnson.*

Solicitors for the respondents the Hammersmith Assessment Committee : *Watson, Sons & Room.*

[HOUSE OF LORDS.]

HAMMERTON AND ANOTHER . . . . . APPELLANTS; H. L. (E.)*

AND 1915

EARL OF DYSART AND ANOTHER . . . . RESPONDENTS. *July* 23.

Ferry—Franchise—Disturbance—Ferry from Point to Point—Change of Circumstances—New Traffic.

In an action for a declaration that the plaintiff is entitled to an ancient ferry and an injunction restraining the defendant from disturbing the plaintiff in the enjoyment thereof, where disturbance is not proved, the Court ought not to make a declaration of the plaintiff's title.

The plaintiffs claimed to be entitled to an ancient ferry from point to point on the river Thames. The lands on both sides of the river shortly below the plaintiffs' ferry had been recently acquired for the public for purposes of recreation, and the lands on the north side had been laid out as a public park; and as a consequence the public resorted to this part of the river in large numbers. The defendants, under a licence from the authority owning the park, moored a barge in the river adjoining the park within 600 yards of the plaintiffs' ferry, and for the convenience of the public visiting the park set up a ferry across the river between the barge and some steps on the opposite side. In an action for disturbance of ferry:—

Held, on the evidence, that, regarded as a whole, the traffic served by the defendants' ferry was created by the opening of the park, and was "new and different traffic" within the principle of *Newton* v. *Cubitt* (1862) 12 C. B. (N.S.) 32; and that the defendants' ferry was not a disturbance of the plaintiffs'.

The term "new and different traffic" explained.

Decision of the Court of Appeal [1914] 1 Ch. 822 reversed.

APPEAL from an order of the Court of Appeal (1) reversing a judgment of Warrington J.

The respondents, the Earl of Dysart and his tenant James Champion (hereinafter called the plaintiffs), claimed to be entitled by prescription or lost grant to an ancient ferry known as Twickenham Ferry for the carriage of foot passengers and their goods across the river Thames between the points marked

* *Present:* VISCOUNT HALDANE, LORD PARKER OF WADDINGTON, LORD SUMNER, LORD STRATHCLYDE, and LORD PARMOOR.

(1) [1914] 1 Ch. 822.

H. L. (E.) 1915

HAMMERTON v. DYSART (EARL).

respectively A and B on a plan annexed to their particulars of claim. By their statement of claim they alleged that the appellants (hereinafter called the defendants), who traded under the name of Hammerton & Co., had lately wrongfully carried divers foot passengers for hire across the river over and upon and within the plaintiffs' ferry, or near thereto, and had disturbed the plaintiffs in the enjoyment of their said ferry, whereby the plaintiffs had lost the profits thereof and had suffered damage, and that they threatened and intended to repeat the wrongful acts thereinbefore complained of unless restrained by injunction, and they claimed a declaration that they were entitled to the ancient ferry aforesaid and an injunction restraining the defendants from disturbing the plaintiffs in the enjoyment thereof.

The defendants by their defence admitted the existence of a ferry or system of carrying persons and goods by boat across the river Thames between the points marked A and B on the plan, but denied that there was any ancient or other franchise or right of ferry between those points. They also admitted that they were carrying on a ferry across the Thames between Marble Hill Park in the parish of Twickenham in the county of Middlesex and Petersham in the borough of Richmond in the county of Surrey, but they alleged that this ferry was more than a quarter of a mile distant from Twickenham Ferry and served a different neighbourhood and was in respect of a totally new traffic, namely, that created by the opening of the said park, and that it was not a disturbance of Twickenham Ferry.

Twickenham Ferry had existed for a great many years and had always been conducted by lessees of the plaintiff the Earl of Dysart or his predecessors in title. The northern terminus of the ferry (point A) was situate in the town of Twickenham close to the spot where two public carriage roads known as Lebanon Park and Riverside met at right angles. The actual approach to the river from this spot consisted of a slipway having landing places on each side of it. The southern terminus of the ferry (point B) was situate in the parish of Ham. At the point B there were wooden steps up the river bank, whence a public footpath led across the towpath in a south-easterly direction for about 200 yards to a public carriage road known as Ham Street.

Pursuant to the powers of the London County Council (General Powers) Act, 1902, the London County Council acquired the Marble Hill Estate, comprising some sixty-six acres with a frontage to the river of about 670 yards, and laid it out as a park, which was opened to the public on May 30, 1903, and they had since maintained it as a public park.

Pursuant to the powers of the Richmond, Petersham, and Ham Open Spaces Act, 1902, the Richmond Corporation and the Surrey County Council acquired all the riverside lands opposite the Marble Hill Estate for the benefit of the public for the purpose of exercise and recreation.

Since the passing of these Acts the public had resorted in large numbers to the lands on either side of the river, especially during the summer months.

Under a licence granted by the London County Council pursuant to the powers of their Act of 1902, the defendants' firm, Hammerton & Co., moored a barge on the banks of the Thames bordering the Marble Hill Park for the purpose of letting out pleasure-boats for the convenience of persons resorting to the park or otherwise. On the south side of the river, nearly opposite the spot where the barge was moored, were some steps leading from the towpath to the river. These steps had been erected by the Thames Conservators about thirty years ago.

Soon after Hammerton & Co. had started their business of letting out boats they began to ferry passengers at a charge of a penny a head across the river Thames between these steps and their barge.

In 1909 the defendants painted the word "Ferry" in conspicuous letters on their barge, and in 1912 they erected in the north end of Orleans Road, where it joined the main road leading from Richmond Bridge to Staines, a signboard containing the words "To Hammerton's Marble Hill Park Boat House and Ferry." Orleans Road skirted Marble Hill Park and ran from the main road to the river. The distance between point A and the place where the barge was moored, measured along Riverside and the Richmond footpath, was about 527 yards, and the distance between point B and the defendants' steps, measured along the towpath, was about 556 yards.

H. L. (E.) 1915

HAMMERTON v. DYSART (EARL).

The evidence showed that in the summer-time large numbers of people coming from Richmond went by way of Petersham Meadows and the Richmond riverside lands to the Marble Hill Park and crossed the river by the defendants' ferry; that the park was mainly used on Saturdays, Sundays, and Bank Holidays; that the numbers resorting to the park had largely increased within the last few years; and that substantially the whole of the traffic using the defendants' ferry was pleasure traffic created by the opening of Marble Hill Park and the Richmond riverside lands to the public. The evidence as to the nature and extent of this traffic is fully stated in the judgments of their Lordships.

The facts as to the plaintiffs' title to an ancient ferry are set out in the report of the case before the Court of Appeal, and are not repeated in this report, inasmuch as the point did not arise for decision, having regard to the view taken by the House on the question of disturbance.

Warrington J. held that the plaintiffs had established their right to a franchise ferry between the points marked A and B on the plan; but that the ferry set up by the defendants in no way disturbed the plaintiffs' ferry. He accordingly made a declaration that the plaintiffs were entitled to an ancient ferry for the carriage of foot passengers and their goods across the river Thames from and to Twickenham in the county of Middlesex to and from Ham in the county of Surrey between the said points marked A and B on the plan annexed to the pleadings, and dismissed the action with costs.

The Court of Appeal by a majority (Cozens-Hardy M.R. and Phillimore L.J., Buckley L.J. dissenting) reversed the decision of Warrington J. on the question of disturbance and granted a perpetual injunction restraining the defendants from disturbing the plaintiffs in the enjoyment of their ferry.

Buckley L.J. held (1.) that the defendants' passage was a public convenience required by the acquisition for the public of the Marble Hill Estate and the river lands on the Surrey side and was not a disturbance of the plaintiffs' ferry; (2.) that the ferry established by Lord Dysart's predecessors in title was not a franchise ferry.

1915. April 26, 30; May 3, 4. *The Hon. M. Macnaghten* and *Humphrey Paul* (for *Eric Gore-Browne*, serving with His Majesty's Forces), for the appellants. The appellants rely upon the judgment of Buckley L.J. in the Court of Appeal. The convenience of the public requires that there should be a ferry between Marble Hill Park and the Richmond riverside lands, and the traffic passing over the Marble Hill Ferry is new traffic within the meaning of *Newton* v. *Cubitt* (1), and the ferry is not a disturbance of the Twickenham Ferry. [Upon the question of disturbance they also referred to *Churchman* v. *Tunstal.* (2) They further contended that Twickenham Ferry was not a franchise ferry; and upon the question of the respondents' title they referred to *Attorney-General* v. *Horner.* (3)]

P. O. Lawrence, *K.C.*, and *Charles Gurdon*, for the respondents. A franchise of ferry confers a monopoly which necessarily imposes a burthen on the public; but it is founded upon public convenience, and the consideration to the public for the monopoly and the toll is the correlative burthen imposed upon the ferryman of serving all who come, and of always keeping a boat in readiness for the purpose. The foundation of the action for disturbance is thus stated in Blackstone's Commentaries (1768 ed.), book iii., c. 13, p. 219: "If a ferry is erected on a river, so near another antient ferry as to draw away its custom, it is a nuisance to the owner of the old one. For where there is a ferry by prescription, the owner is bound to keep it always in repair and readiness, for the ease of the king's subjects; otherwise he would be grievously amerced: it would be therefore extremely hard, if a new ferry were suffered to share his profits, which does not also share his burthen." That shows that the action for disturbance of a ferry is an action of nuisance in respect of an incorporeal hereditament and that the test of disturbance is proximity. In this case the question is what is new traffic which will give rise to a new right of ferry within the principle of *Newton* v. *Cubitt.* (1) In that case, which was one of a series of decisions upon Potter's Ferry in the Isle of Dogs, the new ferry complained of was nearly 1300 yards from the old ferry, and it was held that it was not a disturbance by reason of the change which had occurred in the

(1) 12 C. B. (N.S.) 32.
(2) (1659) Hardres, 162.
(3) (1884) 14 Q. B. D. 245, at p. 257.

H. L. (E.) 1915

HAMMERTON v. DYSART (EARL).

character of the neighbourhood. That was a case in which a new town with a vast industrial population had sprung up on an uninhabited marsh, and the observations of Willes J. must be read with reference to the facts of the case. That learned judge, recognizing proximity as the test of disturbance, simply applied to the case of a ferry the well-known principles applicable to other cases of nuisance, namely, that that which may be a nuisance in Mayfair may not be a nuisance in Bermondsey, and that a change in the character of the neighbourhood to be served may make the degree of proximity required to establish a disturbance of the ferry vary. The same principle, as Willes J. observed, applies to the case of disturbance of a market where a new town has grown up. Moreover, in *Doust* v. *Mathews* (1), which was a decision in reference to this same ferry after Cubitt's Town had sprung into existence, a landing-stage 630 yards away from the old ferry was held to be a disturbance. Other decisions upon the same ferry are *Giles* v. *Groves* (2); *Blacketer* v. *Gillett* (3); *Matthews* v. *Peache* (4); *Letton* v. *Goodden.* (5) This case is the opposite of *Newton* v. *Cubitt* (6), because here the object and effect of the acquisition for the public of the lands on both sides of the river was to prevent building and to preserve the rural character of the neighbourhood. It has never been held that an increase of amenities or amusements in a neighbourhood, e.g., the opening of a recreation ground or a park or a cinema theatre, can support a plea of new traffic, although in each case people might be crossing the river who would not otherwise come there. On that hypothesis it would become impossible ever to support a franchise of ferry. There do not exist here the elements of a demand for a new crossing place on the river. In *Hopkins* v. *Great Northern Ry. Co.* (7) Mellish L.J., referring to *Newton* v. *Cubitt* (6), uses the expression "new and different traffic" for the first time, and suggests —he is not expressing any concluded opinion—"that no action can be maintained in respect of the new ferry if it has been set up bona fide for the

(1) (1856) cited in 12 C. B. (N.S.) at p. 40.
(2) (1848) 12 Q. B. 721.
(3) (1850) 9 C. B. 26.
(4) (1855) 5 E. & B. 546.
(5) (1866) L. R. 2 Eq. 123.
(6) 12 C. B. (N.S.) 32.
(7) (1877) 2 Q. B. D. 224, at p. 232.

purpose of accommodating a new and different traffic from that which was accommodated by the old ferry." These observations are obiter only, for the point there decided was that the erection of a footbridge was not a disturbance of the ferry, and they go beyond anything that was decided in *Newton* v. *Cubitt*. (1) In determining the question what amounts to a disturbance it is irrelevant to consider either the purpose for which the new ferry is set up or the character of the traffic using it; the sole test is proximity having regard to the circumstances of the case. Lord Abinger in *Huzzey* v. *Field* (2), where all the authorities are reviewed, lays down the law in accordance with the respondents' contentions. In *Cowes Urban District Council* v. *Southampton, Isle of Wight and South of England Royal Mail Steam Packet Co.* (3), where the defence of new traffic prevailed, the facts were very special, and Kennedy J. was not right in regarding an increase of traffic as equivalent to new traffic. In *General Estates Co.* v. *Beaver* (4) (the Yarmouth ferry case), where the defendants set up a change of circumstances as creating a new public demand for their ferry, it was held by Pickford J. and by the Court of Appeal, first, that the plaintiffs' ferry was a vill to vill ferry; secondly, that, assuming it to be only a point to point ferry, the facts failed to show the existence of any new traffic within the principle of *Newton* v. *Cubitt* (1), but showed merely an increase and development of the old traffic, and that on any view of the plaintiffs' right the defendants' ferry was a disturbance. The judgment of Warrington J. was based upon a misapprehension of the effect of *Newton* v. *Cubitt*. (1) [They also referred to *Attorney-General* v. *Richards* (5); *Tripp* v. *Frank* (6); *Pim* v. *Curell* (7); and, upon the question of the respondents' title, to *Halliday* v. *Phillips* (8); *Simpson* v. *Attorney-General* (9); Savile's Rep., p. 11, pl. 29; *Trotter* v. *Harris* (10); *Peter* v. *Kendal* (11); *Anguish* v. *Ebden*. (12)]

(1) 12 C. B. (N.S.) 32.
(2) (1835) 2 C. M. & R. 432.
(3) [1905] 2 K. B. 287.
(4) [1913] 2 K. B. 433; [1914] 2 K. B. 918.
(5) (1795) 2 Anst. 603, at p. 608.
(6) (1792) 4 T. R. 666.
(7) (1840) 6 M. & W. 234.
(8) (1889) 23 Q. B. D. 48; [1891] A. C. 228.
(9) [1904] A. C. 476.
(10) (1828) 2 Y. & J. 285.
(11) (1827) 6 B. & C. 703.
(12) (1830) cited in Gunning on Tolls, p. 110.

H. L. (E.) 1915

HAMMERTON v. DYSART (EARL).

The Hon. M. Macnaghten in reply. "New and different traffic" as used by Mellish L.J. does not refer to the character of the individuals constituting the traffic, but refers to traffic coming along highways new and different from those to which the franchise applies, and the Lord Justice was merely following Willes J. *Newton* v. *Cubitt* (1) was affirmed by the Court of Error (2), without hearing the respondents and without giving any reasons, and the inference is that the Court was satisfied with the judgment of Willes J.

The House took time for consideration.

July 23. VISCOUNT HALDANE. My Lords, on the Thames, at Twickenham, there is a ferry. The first question raised in this appeal is whether this ferry is an ancient one, having its origin in a franchise from the Crown which conferred an exclusive right on the owners of the ferry. The second question is whether the appellants, who were defendants in the action, have infringed this right.

Warrington J., who tried this case, was of opinion that the ferry was a point to point ferry of the exclusive character claimed by the respondents, but he came to the conclusion that on the facts there had been no disturbance by the defendants. The Court of Appeal was divided. The Master of the Rolls and Phillimore L.J. thought that Warrington J. was right in drawing the inference that a Crown grant should be presumed creating a franchise of exclusive ferry. But they differed from him in so far as they held that disturbance had been proved. Buckley L.J., on the other hand, took a view different from that of Warrington J. in so far as he held that the franchise claimed ought not, on the documentary and other evidence before the Court, to be presumed. But he agreed with the learned judge in holding that the case for disturbance had failed. The members of the Court of Appeal concurred, however, in saying that, if infringement was not proved, Warrington J. was wrong in making, as he did, a declaratory order that the title to a franchise ferry was established. As the learned judge had found that the plaintiffs could have no relief against the defendants, the Court of Appeal thought that it was not proper, having regard to the character of

(1) 12 C. B. (N.S.) 32. (2) (1863) 13 C. B. (N.S.) 864.

the case, to make a declaration which might prejudge other cases.

I will say at once that I am in agreement with the Court of Appeal on this point, and not the less so because the declaration, if made, would not only establish a right, but would impose on the owner of the franchise ferry a duty, for breach of which he would be indictable, to provide adequately for the carriage of the public. I propose, accordingly, to deal first with the question of disturbance, for if this is decided in the negative it becomes not only unnecessary but improper to express a conclusion on the question of title.

I assume for the purposes of this question that the respondents can establish a franchise entitling them to claim an exclusive right of ferry across the Thames between Twickenham, on the Middlesex bank, and Ham, on the Surrey side. This right cannot, in my opinion, on the only facts which are proved, be claimed as more than an exclusive right to ferry between two points, those where the existing landing places now are ; whether the documents in the case or the usage proved are looked at, I find no evidence from which to presume a vill to vill ferry. I do not, however, think that for the purposes of the present case it would have assisted the respondents if they had proved a vill to vill as distinguished from a point to point ferry.

The facts which the evidence establishes are broadly these. Twickenham Ferry crosses the Thames just below Eel Pie Island. The de facto terminus on the Twickenham side is a public highway running on the west side of the old town of Twickenham, where Lebanon Park is shown on the Ordnance Survey map put in at the trial, down to the river. This highway strikes the river at a point marked A on this map, and there the ferry-boats are stationed. Their terminus on the other side is a point marked B on the map, and this point is at the end of a footpath which I will assume to be a public one, and which leads away from the river across a field belonging to the respondent, Lord Dysart, and runs into a public road called Ham Street, which further up forms the principal street of the village of Ham.

In the summer of 1908 the appellant Hammerton, who was licensed to let boats to people desirous of rowing or being rowed on the river, placed a floating barge off the western end of the Marble

H. L. (E.) 1915

HAMMERTON v. DYSART (EARL).

Viscount Haldane.

Hill Park, to which I shall allude later on. He began to carry persons who hailed him across the river. The barge where he moored his boats was 516 yards distant from the Twickenham terminus of the respondents' ferry, along a lane with high walls which runs from it eastwards close to the river but is shut off from it. On the Surrey side Hammerton used some steps, which were 556 yards, measured along the river, distant from the respondents' terminus on the Surrey side. But for the new crossing a person on the bank of the river at Hammerton's steps, on the Surrey side, or at the barge on the other bank, would therefore have to walk 1072 yards round if he wished to get to Marble Hill Park, which lies on the north or Middlesex side, or to the part of the bank opposite to it and across the Thames. In consequence of a change in the character of the neighbourhood which had taken place about this time, the number of persons who would not naturally desire to walk round, but who wished to be transported across to Marble Hill Park, or from there to the other bank, began to increase. The change was mainly due to the action of certain local authorities. The London County Council acquired Marble Hill Park, which extends to a path that runs along the river bank on the Middlesex side, and converted it into a public park and pleasure ground of considerable area, with refreshment rooms and other conveniences. About the same period the borough of Richmond and certain other public bodies purchased Petersham Common and Meadows, which lie near Richmond, and also a long strip of land of varying width running along the southern bank of the river and extending from Richmond to a point a considerable distance above the respondents' ferry. This strip was called the riverside land. Under the statute which enabled the purchase, the land acquired was to be held, so far at least as concerned Petersham Common and what was known as the riverside land, as an open space and recreation ground for the public.

The result of these changes was soon apparent. The public began to frequent the series of new pleasure grounds in increasing numbers. It was stated by Grant, the under-keeper at Marble Hill Park, who had been there since 1903, that in his time the number of visitors to the park had increased sixfold. Many of them appear to come from London and elsewhere by rail and by motor vehicles and tramway cars. Others come from Richmond. On

Saturdays and Sundays the number of these pleasure-seekers is very great, and some of them naturally desire to cross the river to or from the Marble Hill Park, where the grounds are spacious and well laid out and where refreshments and conveniences are available. Other people walk from Richmond over Petersham Common or along the riverside past the meadows, and then cross the river at Hammerton's Ferry and walk back on the north side to Richmond. None of these classes would naturally go round by the respondents' ferry if the other ferry was available. The lane on the north side, between the landing-stage of Twickenham Ferry on the north side and the river bank at the corner of Marble Hill Park, is shut in and unattractive. I think that while people going between Twickenham and Ham would naturally go by Twickenham Ferry and not by Hammerton's Ferry, which lies right out of their road, the latter is, in the same way, the only natural crossing for that other traffic I have described, and that a great deal of it would probably not cross the river at all if Hammerton's Ferry were not there.

My Lords, on the evidence to which I have referred I think that Warrington J. was right in his finding that there had sprung up a new traffic, substantially differing in character from that served by the old ferry, and that Hammerton's Ferry, when established, met a genuine requirement of the public in connection with this new traffic. I further think that a certain amount of the new traffic which would, had the old conditions continued, have had to go round by the ferry at Twickenham, if it crossed the river at all, now goes by a ferry which connects more directly the accesses on both sides by means of which it reaches the river near the Marble Hill Park. The question to be answered is whether, on these facts, the respondents can successfully claim for disturbance of the Twickenham Ferry. I turn to the consideration of the principles by the application of which to the facts as I have stated them this question must be answered.

In *Blissett* v. *Hart* (1) the character of the right of exclusive ferry was stated by the Court: "A ferry . . . . is a franchise that no one can erect without a license from the Crown: and when one is erected another cannot be erected without an ad quod damnum.

(1) (1744) Willes, 508, at p. 512, note.

H. L. (E.) 1915 HAMMERTON v. DYSART (EARL). Viscount Haldane.

If a second is erected without a license the Crown has a remedy by a quo warranto, and the former grantee has a remedy by action. . . . . The franchise is the ground of the action." As the holder of such a franchise is under a legal duty to maintain the ferry for the public benefit, it was natural that within reasonable limits the law should give him an exclusive right of ferry.

What is the legal character of this right ? The question of what principle underlies and defines the right of exclusive ferry is not an easy one. The expression " monopoly " has been used in this connection. Of course, in one sense the ferryman has a monopoly. But it is not a monopoly within the definition given by Coke in his Institutes (part iii., c. 85) which is limited to a grant from the Crown for " the sole buying, selling, making, working, or using of anything." It is monopolies in this sense that appear to be struck at by the Statute of Monopolies of 21 James I. The right of the ferryman is to carry and to take a toll for carriage, and his right is coupled with an onerous obligation to maintain the ferry. It may well be that his exclusive right is given to him as consideration for his undertaking this obligation, and that it is thus that he becomes entitled to what has been popularly called a monopoly. The origin of the right is the prerogative of the Crown, which is the guardian of the public interest. As Wilmot J. said in *Rex* v. *Marsden* (1) of the analogous franchise of market, " The reason why a market or fair cannot be holden without a grant is not merely for the sake of promoting traffic and commerce ; but also, for the like reason as in the Roman law, for the preservation of order, and prevention of irregular behaviour ; ubi est multitudo, ibi debet esse rector."

The title is not like that to an easement, which pertains to one tenement and affects another. It is a title to an incorporeal hereditament which exists in gross and originates in a grant. The prerogative grant thus creates in the grantee a franchise which, as was said in *Blissett* v. *Hart* (2), is the ground of his right of action. As to the nature of this right of action there are two theories. According to one theory there is no right of action excepting for protection against the infliction of nuisance consisting in actual loss of tolls caused by abstraction of traffic. On this view the cause of action is nuisance strictly so called and nothing more, and accordingly

(1) (1765) 3 Burr. 1812, at p. 1818. (2) Willes, 508.

a substantial interference and consequent pecuniary injury must be proved. The cause of action on this footing resembles that for obstruction of ancient lights. In *Colls* v. *Home and Colonial Stores* (1) your Lordships' House, overruling a good deal of authority, decided that in such a case it was not sufficient merely to prove that the cone of light, which is the subject of what is a negative easement, is diminished by obstruction. The conclusion arrived at was that there is, and can be, no proprietary right to this cone. The only cause of action is one for nuisance caused by a darkening of the windows which enjoy the easement, sufficient to cause a nuisance by rendering the occupation of the building substantially less comfortable. This decision was based largely on a review of the history of the form of action for disturbance of the easement of light, which on scrutiny turned out to be the action on the case for nuisance. In the instance of the right to light the history of the form of action was remarkable evidence of the nature of the right.

But can the analogy be extended with confidence to disturbance of franchises such as those of ferry or market? It is no doubt true that the study of procedure, and especially of the old forms of action, is often illuminating as regards substantive rights in a system of unwritten law such as is ours. But it must always be remembered that in the common law of England the forms of action themselves have from time to time undergone much change. Originally defective, they were often strained and made by artificial expedients to cover substantive rights which the law recognized as existing independently of them, but to which they could only be adapted by the use of legal fictions. In a recent case in this House, *Sinclair* v. *Brougham* (2), your Lordships' attention was directed to the evolution out of case for tort of the form of the action of assumpsit, and finally of the action for money had and received. There, as in other cases, legal fictions were progressively used to extend nominate forms of action so as to cover substantive rights which they could not be used to enforce without the aid of fictions. The history of the action of ejectment affords other illustrations of the caution which must be observed in studying the relation of procedure to substantive rights apart from the fictions by which procedure was constantly being transformed. Another material fact is that the Statute of

(1) [1904] A. C. 179. (2) [1914] A. C. 398, at p. 432.

H. L. (E.) 1915

HAMMERTON v. DYSART (EARL).

Viscount Haldane.

Westminster the Second, which established the so-called action on the case, resulted in the principle that new actions were to be progressively framed on the models of the old writs, enlarging their scope by omitting the technical requirements of the older forms of action. Thus the ancient assize of nuisance, which was a real action available only to the freeholder, was transformed into an action on the case for nuisance available for every one who had an interest in possession against a defendant who had physically interfered with land, including easements attached to it.

It was natural that the new form of action should be so extended as to cover disturbance of such incorporeal rights in gross of a proprietary character as franchises of ferry and market. It was so extended, but I think it is rash to rely on the practice of framing the action in such cases in the form of a claim for nuisance as showing that the analogy of the easement of light is applicable, and that the franchise conferred no substantive right which could be enforced without proof of actual and substantive damage in another form of action. There appears to me to be ground for what is the other theory with regard to such rights. It is that while their infraction may well render admissible, when substantial pecuniary damage can be proved, an action for nuisance in the strict sense, such infraction may also give rise to a right to bring trespass on the case where the damage is only that which arises from violation of a substantive right conferred by the franchise. In other words, that at the foundation there must lie a substantive title of a proprietary character, and that the principle applies which was explained in the judgment of Holt C.J. in *Ashby* v. *White* (1), that "a damage is not merely pecuniary, but an injury imports a damage, when a man is thereby hindered of his right." A franchise is a positive right conferred by grant from the Crown. It does not appear to resemble the right to the negative easement of light as analysed by this House in the case I have already referred to. No doubt abstraction of traffic, which would otherwise yield tolls to the owner of a franchise ferry, is a proximate ground of action for disturbance of the franchise. But if the abstraction be effected, not by carrying in the line of ferry, but at a distance, to what must this distance be limited? Surely it must be measured by some right. For the

(1) (1703) 2 Ld. Raym. 938, at p. 955.

franchise is to take tolls for carrying from point to point or vill to vill only. Merely to carry between other places, even if traffic between the termini prescribed by the franchise is thereby deflected, is accordingly no wrong unless some substantive right is also conferred to exclude rival carriage within ascertainable limits. These limits must depend on the right, for to carry outside the line of the ferry can be no wrong, unless some right is violated, and it must be on some such right that the protection of the tolls depends. If it be otherwise, I do not see why abstracting tolls by building a bridge close to the ferry should not be a wrong, and yet it has been decided that it is not actionable. In other words, the loss of tolls cannot give rise to the right; it is the right which must be the foundation of the claim for the loss of tolls.

If the actual line of ferry conferred by the franchise were violated, it would seem, on principle and analogy, that here at least there is a violation of a right which is defined in the grant, and actionable as such apart from actual pecuniary loss. There are analogous cases, as *Mellor* v. *Spateman* (1) and the notes to that case as reported in 1 Williams' Saunders show. A commoner can sue a stranger who lets his cattle depasture the common, and any one of a number of inhabitants entitled by local custom to a particular water supply can sue a person who obstructs that supply: *Harrop* v. *Hirst*. (2) But a closer analogy is that of a franchise of market. As to this, it is laid down in Lord Hale's note to Fitzherbert's Natura Brevium (184, note *b*), that "if the market be on the same day, it shall be intended a nuisance; but if it be on another day it shall not be so intended; and therefore it shall be put in issue, whether it be a nuisance or not." This view of the right, which implies that it is actionable apart from actual pecuniary damage, and therefore goes beyond nuisance strictly so called, is in accordance with what is laid down in the notes to *Yard* v. *Ford* (3), and with the decisions in *Corporation of Cork* v. *Shinkwin* (4), cited in the judgment of this House in *Great Eastern Ry. Co.* v. *Goldsmid* (5), and in *Mayor of Dorchester* v. *Ensor*. (6) As I read the opinions of the judges in the

(1) (1669) 1 Wms. Saund. (1871 ed.) 612.
(2) (1868) L. R. 4 Ex. 43.
(3) (1670) 2 Wms. Saund. 500.
(4) (1825) Sm. & B. 395.
(5) (1884) 9 App. Cas. 927.
(6) (1869) L. R. 4 Ex. 335.

H. L. (E.) 1915

HAMMERTON v. DYSART (EARL).

Viscount Haldane.

Islington Market Bill (1), they are not inconsistent with what is laid down in the authorities I have just referred to.

My Lords, these considerations have led me to the conclusion that, although the Courts have not, in the case of the franchise of ferry, indicated definite territorial limits as applied in the grant in the same manner as they had done in establishing the seven-mile radius as implied in the franchise of market, yet limits must be implied in the former case as the foundation of the substantive and exclusive right which appears to me to exist. I think that in the case of a ferry this right must be confined to the classes of traffic which the Crown grant has to be read as covering, and I will presently state what I think these classes of traffic are. But before I do so there is an observation which I wish to make. I think that, for the reasons I have given, there is an absolute right quite different from that which this House recognized as the only right in the case of the easement of light. But as to the precise limits within which it is operative I do not desire to express more than a provisional opinion. I think it can be shown that, whatever the precise extent of these limits may be, what the defendants in the present action did lay well outside them. That is enough for the decision of this appeal. No doubt it would be desirable, if we could, to define the limits with precision, but I do not think that it is safe to try, and I therefore desire to guard myself. For this question belongs to a class becoming more and more prominent with the growth of modern scientific research into the foundations of the common law of England, in which the lawyer has to await the results of research by the historian and the jurist before he can be sure of his foundations. The only actual example of a grant from the Crown of this franchise I have seen is the one discussed in *Pim* v. *Curell* (2), and there the wording is ambiguous. It contains no reference to limits, but it does refer to something existing earlier. Now grants of such franchises are not fictions of law, but are documents which the law treats as having actually existed. Such documents may be found hereafter. I think that if this be so the only safe inference in the present case is that the franchise must be taken to have conferred, firstly, an exclusive and absolute right of ferry and of taking tolls between the defined points on the banks of the Thames, and,

(1) (1835) 3 Cl. & F. 513. (2) 6 M. & W. 234.

secondly, a right to say that other people were not to prejudice the profits arising from this right by conveying traffic of certain kinds or classes in the neighbourhood of the ferry. If so, there are two separate remedies, one for infringement of the bare right, the other for nuisance caused by actual loss due to disturbance.

It remains to ascertain to what traffic the protection so accorded to the ferry extends. The decided cases appear to me to enable us to answer this question. Regard must be had in answering it to circumstances. The river Thames, as Lord Hale points out (De Jure Maris, part i., c. 3), and the Wey and the Severn, "and divers others, as well above the bridges as below, as well above the flowings of the sea as below, and as well where they are become to be of private propriety as in what parts they are of the King's propriety, are publick rivers, juris publici." The King's subjects are prima facie entitled to go on the Thames, as on any other public highway, from any points on the banks to which they have access, and cross and recross it freely, and to ferry others across. This is a circumstance which must be taken into account in this case in answering the question as to the reasonable limits of the exclusive right of ferry. The scope of such a right must depend in ultimate analysis on the balance of public advantage, which the Crown in making the grant is to be presumed to have had in view. The Courts will protect a line of ferry from the terminus of one highway on land to the terminus of another on the opposite bank. But when, for example, a bridge has become in course of time an obvious convenience to the public, for the purposes at all events of a new development of traffic, they have refused to forbid its erection on the ground that the terms in which the original right must be presumed to have been granted cannot be construed as intended to cover such a development.

In days when there was but little traffic the Courts were probably less reluctant than they are to-day to protect the right of the ferry owner to take tolls at the expense of the public convenience. With the increase of modern traffic I think there have been distinct indications of an increasing inclination to adapt decisions to considerations of public convenience. Traces of such adaptation in the case of ferries are to be seen in such decisions as *Tripp* v.

H. L. (E.) 1915 HAMMERTON v. DYSART (EARL). Viscount Haldane.

Frank (1) and *Huzzey* v. *Field* (2), but they become most apparent in the judgments in *Newton* v. *Cubitt* (3) and *Hopkins* v. *Great Northern Ry. Co.* (4)

In the first of these cases the judgment of the Court was delivered by Willes J., and it was afterwards affirmed in the Exchequer Chamber. (5) In the second the judgment of the Court of Appeal was delivered by Mellish L.J. In *Newton* v. *Cubitt* (3) it was decided that a new ferry established at a place in the Isle of Dogs, 1280 yards from the point of departure of an ancient ferry, was no disturbance, although to some small extent traffic might be diverted. The reason was that a new population had grown up whose wants were not adequately provided for by the old ferry, and that it would have been oppressive to fix on a large number of people the perpetually repeated necessity to undertake an extra journey of three-quarters of a mile for the sake of the small fraction of the toll which was the profit on each passenger, as well as unreasonable so to increase that profit. If fresh requirements of public convenience required a new passage at such a place as would make it what he termed a real convenience to the public, Willes J. thought the fact of proximity gave no cause of action. He pointed out that the authorities do not, either in respect of ferries or markets or the like, define what proximity is actionable. Fleta, he said, described the proximity of a new market which is actionable to be seven miles on the calculation of twenty miles a day for each person's travelling, and therefore allowed seven miles out and seven back, and time for marketing. "Such a limit," said Willes J., "on such a reason, might be suited to the simple wants of a rude life, where inhabitants are few, but is unfitted for large towns where daily wants are greatly multiplied. Under the latter circumstances, it seems that the area within which a new market would become actionable would be diminished from a diameter of fourteen miles by the public need; and, on the same reasoning, the area for the monopoly of a ferry would depend on the need of the public for passage." It seems that the rules which have been laid down as to the ambit of a monopoly of market have been more definitely formulated than those

(1) 4 T. R. 666.
(2) 2 C. M. & R. 432.
(3) 12 C. B. (N.S.) 32.
(4) 2 Q. B. D. 224.
(5) 13 C. B. (N.S.) 864.

which relate to a monopoly of ferry. It is not necessary to consider whether the rules as to market rights are more rigidly fixed than the words of Willes J. would seem to imply. But it does not appear that any rules so definite have been laid down in regard to ferries.

In the other case, *Hopkins* v. *Great Northern Ry. Co.* (1), a footbridge had been made for the convenience of any one who might wish to get to the railway station, alongside a railway bridge, about half a mile from an ancient ferry, the traffic of which was thereby affected. But Mellish L.J. and his colleagues in the Court of Appeal held that they would be overruling *Newton* v. *Cubitt* (2) were they to say that the company were compelled to leave all persons who wished to cross the river to or from the company's station to go round by the ferry, and that the company were not bound to prevent others from using the footbridge so long at least as they took no toll. They considered that the footbridge was made to provide primarily for a new traffic in which the company had an interest, and which was rendered necessary by changed circumstances, and did not fall within the monopoly conferred by the franchise.

I think that the judgments in these two cases are not only authoritative but instructive. They illustrate the truth that it is not by looking for analogies between the particular facts in old and modern cases that the law applicable is to be gathered. It is by ascertaining what has been the foundation of principle on which the Courts have really built in deciding them and applying the result to the construction of the grant which has been presumed.

Now what lies at that foundation is, in the view to which I have come after examination of the authorities, shortly as follows. In the case of a point to point ferry the exclusive right is only to ferry persons coming along a public way to a landing place and desiring to cross to a landing place on the opposite bank and continue their journey along another public way. It is only in respect of persons using these ways that the exclusive right of ferry exists. It does not matter whence they come or whither they go. The ferryman has no claim in respect of them unless they come to his passage, nor has he any right to complain if people do not use the approaches to his passage. His right is in no sense what has been called a servitude right, and if persons who do not come along

(1) 2 Q. B. D. 224. (2) 12 C. B. (N.S.) 32.

H. L. (E.) 1915

HAMMERTON v. DYSART (EARL).

Viscount Haldane.

the public paths between which his ferry extends choose to avail themselves of the highway of the Thames at some other place, he cannot object. He cannot control the freedom of action of those who pass to and from places which lie away from the public paths which he serves, such as are Marble Hill Park and the open spaces on the other side of the river, or prevent any one from carrying them in boats over it to the accesses to such places.

But he has a right of another kind. He is entitled to a monopoly of his line of ferry, and he has a cause of action against any one who carries either in that line or in another line of ferry so near as to make it an alternative way of carrying between substantially the same points. The other line may be such that the circumstances render it in the main little more than a competitive route for those who would naturally proceed by the old ferry. If so, there is a cause of action for disturbance against any one who abstracts passengers by setting up the second ferry. But if the new ferry is not of this kind, but is set up in order to carry, not those who desire to follow the old line, but another class consisting of those who wish to go to places which have become frequented and are really and not only colourably different from the old termini and the highways which end in them, they cannot be debarred from using it, and so be indirectly compelled to travel out of their way. The question is in each case one of fact rather than of law. It is a question of what passages, as these passages are to-day, the monopoly now includes, a question of construction which has to be decided with reference to the circumstances of the period. Is the new ferry in substance and in the main a means of abstracting the traffic of the old ferry, or does it carry a new and different kind of traffic, for which the convenience of the public requires a fresh provision? Such provision will be deemed to be requisite if it is for the convenience of any considerable number of persons constituting a new and separate class which would not naturally travel along the old highways, and if it did would have to go materially out of its way in order to cross. This is what I think Willes J. meant when he spoke in *Newton* v. *Cubitt* (1) of a real convenience to the public.

Such a class of the public may consist of persons frequenting the

(1) 12 C. B. (N.S.) 32.

banks of a river at places comparatively near to the old ferry, if in the ordinary course they would not resort to the highways which the ferry serves, but would cross at other points more convenient to them. Where the river is not one which they would naturally and frequently cross, and they are not numerous, it may be that the old ferry will be held to provide for them to an extent sufficient for their convenience, and in such a case the balance of public advantage may be in favour of construing the monopoly as wide enough to cover the whole region, in order to make practicable fulfilment without loss of the obligation to maintain the old ferry. But every such monopoly ought to be strictly construed. Just as it does not preclude the setting up of a bridge to serve new though adjacent traffic, because such an interference with what the convenience of the public requires under the new conditions is held not to have been within its purview, so if there is a sufficiently large and defined class, containing a substantial number of people who would naturally cross the river at points and with objects different from those which obtained with the class of people who frequented the old ferry, the former class will be outside the monopoly.

It is, in my opinion, a question of fact in each case whether such a class exists, and in answering this question of fact regard must be had to numbers, to change of circumstances, and to the character of the river as a place of public resort. It is no objection to an affirmative answer that the old ferry will be seriously affected if, the conditions above defined being fulfilled, it is affected only incidentally. Rights of ferry, like rights of market, depend on whether the old right is infringed. This right cannot be said to be infringed if all that is proved is a damnum that has been sine injuria inasmuch as it has arisen from deprivation of new traffic which the old ferry has been enjoying, not because it naturally belongs to it, but because there was no other way across until the new ferry was made. On the other hand, if tolls are abstracted by the diversion of the class of people who would naturally have frequented the old ferry an action will lie which may be for damage by nuisance, or possibly for the mere infringement of the right not to have the assigned class diverted.

My Lords, if I have interpreted aright the facts and the law applicable to them, it of course follows that the traffic carried by

H. L. (E.) 1915 HAMMERTON v. DYSART (EARL).

Hammerton's Ferry was not within the monopoly claimed by the respondents. It therefore appears to me that the judgment of the Court of Appeal ought to be reversed and that of Warrington J. restored, but with this variation, that the declaration of title which he made should be struck out. The respondents should, as a consequence, pay the costs in this House and in the Courts below.

LORD PARKER OF WADDINGTON. (1) My Lords, before dealing with the facts of this case I propose to consider the nature and incidents of franchise ferries. The authorities on the subject, though few in number, give rise to various difficulties, and obviously a clear conception of the nature of a right is necessary if a correct decision is to be given on a question whether the right has been infringed.

My Lords, it is quite certain that no man can lawfully set up a common ferry without a grant from the Crown. "He may," to use the words of Sir Matthew Hale in his treatise De Jure Maris, "make a ferry for his own use or the use of his family, but not for the common use of all the King's subjects, because it doth in consequence tend to a common charge, and is become a thing of public benefit and use." The common charge referred to by Sir Matthew Hale is obviously something in the nature of a toll, which, as is well settled, can only be created by Royal grant. A ferry is therefore not only a franchise, but primarily a toll franchise. As in the case of all tolls, some consideration moving to the public is essential to its validity.

Tolls are generally classified as tolls-traverse and tolls-thorough. If, apart from the franchise, no one would have had a right to do that for which the toll is charged, the toll is a toll-traverse. If, apart from the franchise, any one would have had the right to do that for which the toll is charged, the toll is a toll-thorough. In the former case the consideration moving to the public may be found in the right conferred on the public by the franchise. For example, if before the creation of the franchise the road for the use of which toll is charged was a private road, the consideration may be the dedication of the road to the public. In the latter case the consideration moving to the public cannot be the dedication of the

(1) Read by Lord Parmoor.

road, for the road was ex hypothesi at the time of the creation of the franchise already a public road. It must be found elsewhere, for example, in an obligation to keep the road in repair. There is some doubt whether a ferry toll ought to be classified as toll-traverse or toll-thorough. If it is to be regarded as a toll for crossing a river or arm of the sea over which there is a public right of passage, it would be a toll-thorough. Against this view, however, it may be observed that a ferry toll cannot strictly be so regarded, for the ferry owner appears to have no right to charge the toll against any one who crosses otherwise than by means of his boats. A person who crosses in his own boat is not subject to the toll. The better view would appear to be that the toll is taken for the use of the conveniences for crossing, in which but for the franchise the public would have no rights at all. If this be the true view the ferry toll is a toll-traverse. The point is of no great importance, for in either case the necessary consideration is found in the ferry owner's obligation to provide boats for the public convenience and the right of the public to avail themselves of these boats at their pleasure. From the fact that the public have the right at all times to avail themselves of the services of the ferry, it follows that if the terminus of the ferry on either side is not itself situate in a public highway, it must at least be connected with a public highway by some road which the public have a right to use, if not for all purposes, at any rate for the purpose of getting to or from the ferry.

Further, there can, I think, be little doubt that the acceptance of a grant of a franchise of ferry by a person who owned the landing place on either side of the stream would operate as a dedication by him to the use of the public, not only of the landing place itself, but of a convenient way from such landing place to the nearest highway for the purpose of getting to or from the ferry. Inability to make such dedication would avoid the grant, because there would be a failure of the consideration moving to the public. They could not use the ferry if they had no access to it. A ferry may thus be regarded as a link between two highways on either side of the water, or as part of a continuous highway crossing the water.

My Lords, a franchise of ferry, depending as it does upon grant from the Crown, can be acquired by prescription at common law, which presumes such a grant prior to the reign of Richard I., or by

H. L. (E.) 1915

HAMMERTON v. DYSART (EARL).

Lord Parker of Waddington.

the proof of facts from which a grant of more modern date can be inferred by the jury or the judge sitting as jury. The acquisition of rights, as well by prescription at common law as by the presumption of lost grant, depends on the proof of long user or practice for which a legal origin will, if possible, be presumed, and which would have been unlawful without some such presumption. If, therefore, it be sought to establish a franchise ferry by prescription at common law or by presumption of lost grant, the claimant must prove a user or practice, which, if it is to be deemed to have been lawful, must necessarily have originated in a Royal grant. It is to be observed also that, though proof that the user or practice relied on originated since the reign of Richard I. will defeat prescription at common law, it will not necessarily defeat a claim based on the presumption of a grant at or since the time when it is proved to have originated.

My Lords, so much is reasonably clear, but the moment we proceed to further analysis of the franchise, the question arises whether the exercise of the prerogative necessary for the creation of a franchise toll is exhausted by such creation, or whether it must be assumed to go further and create some sort of monopoly. Apart from statute, a monopoly cannot, any more than a toll, be created without an exercise of the Royal prerogative. Monopoly consists in the exclusive right granted by the Crown of doing within a defined area some definite thing which, but for the monopoly, all His Majesty's subjects could have lawfully done within that area, but can no longer lawfully do because of the monopoly. The area within which the monopolist has the exclusive right of doing the thing in question and the area within which he has an absolute right to prevent other persons from doing it are not different areas, but precisely the same area. The word " monopoly " is, however, often used in a popular sense as applicable to a state of circumstances in which the common law right of every man to carry on his affairs as he may think best in his own interest is to some considerable degree curtailed by the rights of or contracts entered into by others. A franchise ferry has been constantly referred to as involving some sort of monopoly, but it is often not at all clear whether in this connection monopoly is used in the strict legal sense or according to the more popular meaning. I propose, therefore, to consider

the question whether a franchise of ferry ought to be regarded simply as an incorporeal hereditament consisting of the right to take tolls from persons availing themselves of the services of the ferry, coupled with an obligation to provide for such services, or whether it should be considered as also involving a monopoly in the legal sense of that word. Every right in one person involves an obligation in others, and it is obvious that the obligation on the part of others involved in the existence of a franchise of ferry will be widely different according as the first or second view above mentioned be accepted as the true one. Thus if the franchise is to be viewed as creating a true monopoly the question at once arises, a monopoly of what? The only reasonable answer is, a monopoly in carrying passengers by boat. From this it inevitably follows that no person who does not carry passengers by boat can infringe the monopoly, and that a bridge is no disturbance of a ferry. This was the view taken by the Court of Appeal in *Hopkins* v. *Great Northern Ry. Co.* (1) On the other hand, if the franchise is to be viewed simply as a species of incorporeal hereditament, the obligation imposed upon others might be an obligation to do nothing which could interfere with or disturb the franchise owner in the reasonable enjoyment of his right. On this footing it is at least arguable that the building and opening to the public of such a bridge might, though it need not necessarily, operate to the injury of the franchise owner, and so disturb his right. This was the view taken by Blackburn J. in *Reg.* v. *Cambrian Ry. Co.* (2)

Again, if the franchise is to be looked upon as a monopoly of carrying passengers, it would be pertinent to inquire in each case within what limits such monopoly had been granted and with respect to what passengers. Clearly no one could infringe the monopoly who carried passengers outside the territorial limits assigned in answer to this question, or who carried passengers not the subject of the monopoly.

My Lords, franchise ferries as known to the English law are either point to point ferries or vill to vill ferries. In the former case the terminus on either side of the water is a fixed point and cannot be varied, at any rate to any substantial extent; in the latter case there may be more than one terminus on either side of the water

(1) 2 Q. B. D. 224. (2) (1871) L. R. 6 Q. B. 422.

H. L. (E.) 1915

HAMMERTON v. DYSART (EARL).

Lord Parker of Waddington.

and the termini may be varied by the ferry owner, but only within the boundaries of the two vills. It is possible that the franchise owner is bound from time to time to vary the termini of a vill to vill ferry to suit public convenience. Further research may throw some light on the matter, but I have been unable at present to discover any trace of the grant by the Crown of a ferry within territorial limits other or larger than such limits as are involved in the expressions "point to point" or "vill to vill." Indeed, I have been unable to find any express grant by the Crown of a franchise of ferry at all, unless it be the grant of 4 Edw. 3, cited in *Pim* v. *Curell.* (1) But this appears to have been by way of confirmation of an existing ferry, and throws no light on the matter. The ferries which have been the subject of litigation in the Courts have, I think, been invariably ancient ferries, whether confirmed by Royal grant or otherwise, and their nature and extent has, I think, invariably depended on the nature and extent of the user proved. It is difficult to see how in an action to establish a point to point ferry or a vill to vill ferry, either by prescription or presumption of lost grant, evidence of the exercise of the right otherwise than from point to point or from vill to vill would be admissible on behalf of the plaintiff. If it were admissible it would tend to show a user larger than the right alleged would justify, and, if anything, would be evidence against the existence of the right. If, therefore, a ferry confers any exclusive right to the carriage of passengers, I do not see how this right can, at any rate in the case of ancient ferries, be extended in the case of a point to point ferry beyond the carriage of passengers by boat between the points in question, or in the case of a vill to vill ferry beyond the carriage of passengers by boat from vill to vill. It is, of course, clear that a point to point ferry may be disturbed by the carriage of passengers between points other than the termini of the ferry in question, and that a vill to vill ferry may be disturbed by the carriage of passengers outside the boundaries of the vills on either side of the stream. It has been suggested that this can be explained on the ground that what was complained of was being done, if not exactly, at any rate substantially, within the area of the monopoly, that is substantially between the termini of the ferry or between the two vills.

(1) 6 M. & W. 234, at p. 236.

If this suggestion be right, I suppose it would be a question for the jury in each case whether the passengers had been carried substantially in the line of the franchise ferry, and an intention to evade the franchise ferry would be material just as an intention to deceive is material in considering whether one trade mark differs only colourably from another: see *Tripp* v. *Frank*. (1) But on this footing it ought to follow that the ferry owner's right to carry passengers for toll may be exercised not only within the precise limits of the grant, but within such extended limits as the jury might find to be substantially the same. I can find no authority for such a proposition. It would introduce an undesirable element of uncertainty into the area of the Crown grant. If, on the other hand, this extension of the exclusive right be rejected, we should have a monopoly involving an unqualified right to restrain others from doing what the monopolist could not do himself. But however this may be, it is quite clear that some of the reported decisions cannot be explained in this way. For example, a franchise ferry has been held to be infringed by a rival ferry situate at such a distance from the franchise ferry that no jury could possibly hold the two ferries to be substantially in the same line. Thus in *Blacketer* v. *Gillett* (2) the rival ferry was over 600 yards distant from the franchise ferry. It would be absurd to suggest that the owner of a point to point ferry could set up another ferry 600 yards distant without a fresh grant from the Crown. If, therefore, such cases as *Blacketer* v. *Gillett* (2) depend on some monopoly in the ferry owner, it must be a monopoly of the anomalous character above referred to.

If we pass from the territorial limits of the monopoly to the class of passengers to which the monopoly extends, we find that various suggestions have been made. Though it appears to be universally admitted that the obligation involved in the franchise extends to all His Majesty's subjects, it has been said that in the case of a vill to vill ferry the right of carriage is confined to passengers whose destination is one or other of the two vills, and in the case of a point to point ferry to passengers going along the highway to the nearest town or vill to which the highway leads on either side:

(1) 4 T. R. 666.

(2) 9 C. B. 26.

H. L. (E.) 1915 HAMMERTON v. DYSART (EARL). Lord Parker of Waddington.

Huzzey v. *Field*. (1) I can find no suggestion to meet the possible case of there being two highways from the termini of the ferry leading to distinct vills. On the other hand, it is laid down in Willes J.'s judgment in *Newton* v. *Cubitt* (2) that the franchise owner's right, as well as his obligation, extends to all passengers who come to his ferry, no matter whence they come or whither they go.

My Lords, it has been said that the common law may be found secreted in the interstices of procedure, and certainly the nature of a right may often be ascertained by analysing the remedy for its breach. In the case of *Colls* v. *Home and Colonial Stores* (3) your Lordships thus ascertained the nature of a right to ancient lights. The prevalent notion that enjoyment for twenty years conferred on the dominant tenement an exclusive right to the cone of light coming to the window in question, and that any one who obstructed part of this cone invaded the right, was held to be inconsistent with the fact that the remedy at law for disturbance of the easement had always been in the nature of an action for nuisance, in which substantial damage had to be proved. Now it has long been settled that the appropriate remedy for disturbing a franchise ferry is an action on the case in the nature of nuisance. Nuisance has in English law a well-defined technical meaning. It was already used as a word of art in the writ leading to the assize of nuisance, upon the analogy of which the action on the case for nuisance was undoubtedly framed (Glanville, XIII., 35 to 38). This assize is said to have been a complement to the novel disseisin, designed to meet cases in which there was no disseisin or even trespass, but in which one man was damaged in the enjoyment of his freehold by something done on another's land. The principle underlying it was the same as in the maxim "Sic utere tuo ut alienum non laedas." Nuisance, then, involves damage, but damage alone is not sufficient to give rise to a right of action. There must be some right in the person damaged to immunity from the damage complained of. As an instance of damage which gives rise to no cause of action, that is, of damnum sine injuria, Bracton mentions the case of a mill, the profits of which might be seriously damaged by the competition of a rival mill without giving rise to any action for nuisance. The

(1) 2 C. M. & R. 432. (2) 12 C. B (N.S.) 32.
(3) [1904] A. C. 179.

mill owner has no right to immunity from damage to his profits by reason of competition on the part of others. In the case of an action for disturbance of a ferry the damage alleged has invariably been that the profits of the ferry had been diminished or impaired. It is laid down in a case as early as the Year Book 22 Hen. 6, 14, that "If I have of ancient time a ferry in a town and another sets up a ferry upon the same river near to my ferry, so that the profits of my ferry are impaired, I shall have against him an action on the case."

So much is clear, but why does the ownership of a ferry confer a right to immunity from damage by competition, whereas the ownership of a mill does not? The answer is given by Newton C.J. in the same case. The right of the ferryman involves an obligation to keep up the services of the ferry for the benefit of the public, but the right of the mill owner involves no such obligation. The ferryman has undertaken a public burden in consideration of the Crown's grant of the right to take tolls, and he would have a legitimate grievance if the public, while enjoying the benefit of the obligation, were allowed to destroy the consideration for which it was undertaken. This ground of distinction between the franchise ferry tolls and the mill has always been recognized, and has constituted the ratio decidendi of at least two reported cases. In *Letton* v. *Goodden* (1) Kindersley V.-C. held that no action would lie for the disturbance of a ferry created by Act of Parliament, there being, according to the true construction of the Act, no obligation on the part of the ferry owner towards the public, and no reason, therefore, for distinguishing the case of the ferry in question from the case of a mill. It is observable that the Vice-Chancellor speaks of the right of ferry, whether created by an exercise of the prerogative or by statute, as an exclusive right. If, therefore, the true basis of an action for disturbance of a ferry had, in his opinion, been the existence of a monopoly in connection with the carriage of passengers, he ought to have decided otherwise than he did decide. It is also to be observed that the statutory ferry in question was in the nature of a point to point ferry, and the disturbance complained of was the carriage of passengers between points other than, though quite near to, the termini of the statutory ferry. The decision is therefore consistent with the existence of some monopoly right in

(1) L. R. 2 Eq. 123.

H. L. (E.) 1915 HAMMERTON v. DYSART (EARL). Lord Parker of Waddington.

the exact line of the ferry. The second case above referred to is the case of *Londonderry Bridge Commissioners* v. *M'Keever* (1), where the facts were similar and, as I read the judgment of Lord Ashbourne, the ratio decidendi the same.

My Lords, in the case of all rights, the remedy for breach of which is an action on the case in the nature of nuisance, a mere casual interference is not necessarily actionable. The extent of interference necessary to constitute an actionable wrong may vary with the varied circumstances of the case. It takes more than one puff of smoke to create a nuisance by noxious vapour, and more than one bang of a big drum to create a nuisance by noise. Temporary interference with an ancient light necessitated by temporary operations on adjoining land is not actionable. Further, the character or circumstances of the neighbourhood are always material in considering the degree to which the owner of the right said to have been infringed is entitled to immunity from interference by others. What may be a nuisance by smoke or noise or interference with light under one set of circumstances is not necessarily a nuisance under a totally distinct set of circumstances. That which the law protects is the reasonable enjoyment of the right in question, and in deciding whether the right is infringed the law has due regard to the needs and interests of others. The convenience or inconvenience entailed by the assertion of the right is not without its materiality.

From this point of view it is quite easy to understand the opinion of Mellish L.J. (*Hopkins* v. *Great Northern Ry. Co.* (2)) to the effect that it does not follow that because a new ferry diverts some part of the traffic from the old ferry it is therefore actionable. A ferry otherwise lawful will not be rendered unlawful because now and again it is resorted to by persons who but for its existence would have used the franchise ferry. From the same point of view it is easy to appreciate the stress which is laid by Willes J. in *Newton* v. *Cubitt* (3) and by Kennedy L.J. in *Cowes Urban Council* v. *Southampton, Isle of Wight, and South of England Royal Mail Steam Packet Co.* (4) on the reasonable requirements of public convenience.

(1) (1891) 27 L. R. Ir. 464.
(2) 2 Q. B. D. 224.
(3) 12 C. B. (N.S.) 32.
(4) [1905] 2 K. B. 287.

My Lords, all this, though possibly consistent with the existence of some monopoly of carriage between point and point or between vill and vill, is in my opinion quite inconsistent with the view that the franchise of ferry confers or involves a monopoly in the proper sense of the word outside those limits. In the case of such a monopoly it would be necessary in the declaration to aver the right by Royal grant of the exclusive right of doing the thing in question within certain territorial limits, and to declare that the defendants had within those limits done that particular thing or something which differed from it colourably only. The question for the jury would be infringement or non-infringement of the monopoly right. There might be an invasion of the right, though no damage were alleged or proved. There might be injuria sine damno, and the extent or degree to which the declarant was entitled to insist on his right would not vary with the circumstances of the case. The right would be an absolute right within the territorial limits specified in the grant, and no change of circumstances could affect it. No question as to the reasonable requirements of the public under the circumstances of the case could possibly arise.

Further, the authorities generally relied on for the proposition that a franchise of ferry creates a monopoly are open to this criticism. While admitting the necessity of territorial limits, if such a monopoly is created, they afford no certain criterion from which these limits can be ascertained. On principle these limits ought to be specified, or, at any rate, implied in the grant of the monopoly, and once ascertained, by putting a construction on the grant they would be determined once for all. Their determination would be for the judge, and not for the jury. The grant of a monopoly within limits to be ascertained from time to time by the verdict of a jury, according to what they considered reasonable under the circumstances, might very well be void for uncertainty. Further, there is, I think, serious doubt whether the Crown could by virtue of its prerogative create any monopoly for the carriage of passengers at all. The words of the 1st section of the Statute of Monopolies are wide enough to invalidate all monopolies of every description already granted or thereafter to be granted, except those for new inventions within the excepting clause. It would be dangerous to limit the monopolies struck at by the statute to those specifically

H. L. (E.) 1915 HAMMERTON v. DYSART (EARL). Lord Parker of Waddington.

mentioned in Lord Coke's definition. If this were done the Crown might still grant exclusive trading rights between this country and some of the Crown oversea possessions. It is to be noticed that in *Churchman* v. *Tunstal* (1) a franchise of ferry seems to have been held bad as a monopoly. This was in the time of the Commonwealth, but in a later case in the reign of Charles II. Lord Hale refused to follow this decision and upheld the same franchise, declaring that the defendant should not have liberty to use any ferry-boat to the annoyance of the ancient ferry (2); *Huzzey* v. *Field*. (3) Lord Hale's reasons are nowhere stated, but it is clear that he refused to consider a franchise ferry as conferring a monopoly in the strict sense of the word, looking upon it as an incorporeal hereditament for disturbance of which an action for nuisance would lie. For this position there was then already sufficient authority. It is worthy of notice that the argument in *Churchman* v. *Tunstal* (1) emphasizes the difficulties arising from the uncertainty of territorial limits, if the franchise be regarded as conferring a monopoly.

My Lords, there is a somewhat striking analogy between a franchise ferry and a franchise market. No one can hold a market without a grant from the Crown. Markets are of two kinds, namely, those in which the place where the market can be held is defined by metes and bounds, and those in which it can, at the option of the franchise holder, be held anywhere in a particular township or vill. In the former case the franchise confers no right to hold the market otherwise than in the place defined by metes and bounds. In the latter case it confers no right to hold the market outside the township or vill. Within the township or vill the market-place may from time to time be varied, but probably in so varying it the owner is bound to consult the public convenience. The remedy for disturbance of a market is an action for nuisance. The profits of the market must have been impaired or diminished by what is complained of. It appears, however, to have been laid down by the judges in very early times that they would entertain no such action if what was complained of had been done outside a radius of seven miles from the franchise market. The reasons given for this ruling are quite

(1) Hardres, 162. (2) 2 Anst. at p. 608.
(3) 2 C. M. & R. at p. 441.

inadequate. They depended on a calculation of the normal time which persons using the franchise market would require to get there, do business there, and get home again, it being assumed that all this must be done on the same day and by daylight, and no notice being taken of the varying facilities for travel in different cases. Granted, however, that no one outside the seven miles limit could resort to the franchise market, it would by no means follow that persons inside the limit would not be diverted from the franchise market to the rival market outside that limit. The same calculation of time would show that they might easily be so diverted. The logical result of the reason given would have been to fix a limit of fourteen miles. It is evident, however, that the reason, whether good or bad, is based rather on the possibility or probability of damage than on any inference or presumption as to the territorial limits of the Crown grant, whether actually existing or presumed from user. The seven-mile limit was well settled as early as 1670 (*Yard* v. *Ford* (1)), and a declaration based on something done outside this limit was thereafter clearly demurrable. The seven-mile limit having been established as the common law limit of a franchise market, the question arose whether a rival market set up within this limit and held on the same day as the franchise market was necessarily actionable, or whether damage to the profits of the franchise market must be proved. In the case of a rival market held on a different day there was never any question as to the necessity of proving damage. In *Mayor of Dorchester* v. *Ensor* (2) it was held that if the rival market were held on the same day as the franchise market damage would be intended by law. This may mean that the owner of the franchise market had an absolute right to prevent a rival market being held on the same day within the seven miles, whether he was damaged or not, or it may mean that there was, from the very circumstances of the case, such a presumption of damage that the jury, in default of strong evidence to the contrary, were bound to find damage. I think that the judges who gave their opinions on the Islington Market Bill took the latter view. They say (3) "the establishment of a new market, to be holden at the same times within the common law

(1) 2 Saund. (1845 ed.) 172. (2) L. R. 4 Ex. 335.
(3) 12 M. & W. at p. 21.

H. L. (E.) 1915

HAMMERTON v. DYSART (EARL).

Lord Parker of Waddington.

distance of an old market, prima facie is injurious to the old market, and therefore void." Two of the judges, including Parke B., suggest circumstances under which the jury, on a writ ad quod damnum, would be justified in finding that the Crown could grant a market within seven miles of an existing franchise market without damaging the latter. It is to be observed that in *Clinton's Case* (1) an issue was left to the jury as to whether a rival market held within two miles of, and on the same day as, a franchise market was or was not a nuisance to the franchise market. An absolute right on the part of one person to prevent others from doing what he himself had no right to do would, as I have already pointed out, be an anomaly quite out of harmony with the principles of the English law; and it is quite clear that the owner of a market franchise cannot, without trenching on the prerogative, hold a market otherwise than at the precise place or within the township or vill for that purpose specified in his grant.

My Lords, in an action for nuisance to a franchise ferry the declaration has generally contained two counts, the first alleging that the defendants had done the thing complained of within the limits or in the line of the franchise ferry, and the second alleging that they had done the thing complained of near to the franchise ferry, each count containing an allegation of damage to the tolls or profits of the ferry. The case of *Blacketer* v. *Gillett* (2) above referred to is an express authority that the declarant, though failing on the first count, might succeed on the second; in other words, that he might have an action for nuisance for things done outside the limits of his ferry. In such an action the appropriate plea was in each case "not guilty," and the question for the jury was whether the counts, or either of them, had been proved; in other words, a question of nuisance or no nuisance. The question as to whether there was or was not any monopoly right within the precise limits of the ferry, that is to say, between point and point or vill and vill, cannot properly arise, and, with the possible exception of the recent case of *General Estates Co.* v. *Beaver* (3), does not seem to have been the subject of judicial decision. In the last-mentioned case Lord Reading appears to have been of opinion that in the case of a

(1) Pike's edition of Year Book 12 & 13 Edw. 3, pp. 208—210.

(2) 9 C. B. 26.

(3) [1914] 3 K. B. 918.

vill to vill ferry there was a monopoly of the carriage of passengers within the limits of the two vills, and that it was unnecessary to consider the question of damage by a rival ferry within those limits. He did, however, proceed to consider this question, and arrived at the conclusion that damage had been in fact proved.

Lord Parker of Waddington.

My Lords, the foregoing considerations point to the conclusion that, whether or not the franchise of ferry can be regarded as conferring any monopoly from point to point or from vill to vill, it does not outside those limits involve any monopoly in the legal sense of that word, though, in so far as the free action of others is restrained by the existence of the franchise, it may perhaps be referred to as a privilege, having some of the incidents of a monopoly. In my opinion the franchise of ferry is for the purpose of proceedings for disturbance to be regarded as a toll franchise, good in law as being founded on a sufficient consideration moving to the public, who, as they receive a benefit, are subjected to a corresponding obligation, so that if another, without legal authority, interrupts the grantee in the exercise of his franchise by withdrawing the profit of passengers which he would otherwise have had, and which, to use the expression of Lord Abinger in *Huzzey* v. *Field* (1), he has in a manner purchased from the public at the price of his corresponding liability, the disturber is subject to an action for the injury. In an action for disturbance by a rival ferry, the first question is whether what the defendant has done or is doing operates to divert traffic from the franchise ferry and diminish the profits of the franchise toll. If it does the right is prima facie disturbed. If it does not there is no disturbance. On this footing there is no question of any monopoly granted by the Crown. The action for disturbance is an action of nuisance pure and simple, and its success or failure does not depend on ascertaining from the grant either the territorial limits of some monopoly or the class of passengers to which such monopoly relates. If there be any limits of a franchise ferry beyond those implied in the expressions " point to point " or " vill to vill," they are simply those limits within which a rival ferry disturbs or must necessarily disturb the franchise right. On the other hand, the distance of the rival ferry from the franchise ferry, the nature of the traffic served by either, the varying circumstances of the neighbourhood,

(1) 2 C. M. & R. 432.

H. L. (E.) 1915

HAMMERTON v. DYSART (EARL).

Lord Parker of Waddington.

including the creation of new highways, and the extent, small or large, to which the rival ferry has diverted passengers from the franchise ferry, may all be of great materiality in determining whether or not there is an actionable nuisance. Thus in *Newton* v. *Cubitt* (1) the jury found that the defendant's ferry had been started to afford necessary accommodation to the inhabitants of Cubitt Town, and not to divert passengers from the franchise ferry, though it might to a small extent have that effect. From this it followed that the bulk of the traffic served by the defendant's ferry was not such as would, if such ferry had not existed, have resorted to the franchise ferry, and that if the latter ferry were in fact interfered with at all it was not, at any rate under the particular circumstances of the case, interfered with to such an extent as to amount to a nuisance at common law.

With regard, however, to the propositions that a change of circumstances creating new highways on land would carry with it a right to continue the line of those ways across a water highway, or that the public convenience will in all cases justify the setting up of a rival ferry, I cannot accept them without qualification. If, for example, a riparian owner in the neighbourhood of the ferry developed his land as a building estate and laid a highway terminating at the water's edge, I cannot think that this alone would justify him in setting up a rival ferry, which, in fact, operated to divert a substantial amount of traffic from the franchise ferry. If it could, the franchise would be at the mercy of any landowner who chose to dedicate a new road. Again, I cannot think that a rival ferry must in every case be lawful if it is a real convenience to the public. It is always a real convenience to the public to travel by the shortest route. On the other hand, the existence of new highways and the convenience of the public are alike material in considering whether the rival ferry in fact diverts traffic to the injury of the franchise ferry, or whether, if traffic be in fact diverted, the extent of the diversion is, under all the circumstances of the case, such as to be actionable as a nuisance at common law. In like manner it would, I think, be wrong to treat the nature of the traffic carried by the rival ferry as an infallible test on the question of its legality. A residential neighbourhood may develop into an

(1) 12 C. B. (N.S.) 32.

industrial neighbourhood, and give rise to a traffic altogether different in its nature from the traffic theretofore carried by the franchise ferry. If, as is clear, the obligation of the ferry owner extends to carrying this new traffic, it would be unreasonable to hold that he could be lawfully deprived of the benefits accruing to him from its existence merely because it is new. Where new and different traffic is spoken of in this connection, it must, I think, mean traffic the bulk of which has been created by the erection of the rival ferry, and which, but for such ferry, would not have existed at all, that is, would not have increased either the profits or burdens of the owner of the franchise. In determining whether traffic is new and different in this sense public convenience is again material. The inconvenience of going round by the franchise ferry may be so great as to justify the inference that, but for the existence of the rival ferry, it would not have crossed the river at all, or have crossed only in cases of urgent necessity. In considering whether there is a nuisance, it may be legitimate to ignore the latter cases, as also any small residuum of passengers who now use the rival ferry whereas they formerly crossed by the franchise ferry. The circumstances may make it unreasonable to allow the franchise owner, for the sake of some small advantage to himself, to interfere too largely with the convenience of others. In every case the question is one of nuisance at common law, and though, since *Newton* v. *Cubitt* (1), it has become common form to plead that the rival ferry serves new highways or carries new and different traffic, these are not pleas in bar, but pleas of special circumstance bearing on the main issue, which is always whether or not the profits of the franchise toll have been impaired or diminished by what the defendant has done or is doing.

My Lords, if the above analysis of the nature of a ferry right be substantially correct, the first thing to be considered in the present case is whether the respondents have established that the ferry they complain of has operated to any and what extent to divert traffic which would otherwise have crossed the river by their franchise ferry, and so diminished the profits of their franchise. Unless they have succeeded in establishing some such diversion, and some such diminution in profits, their action must fail, and further, even if

(1) 12 C. B. (N.S.) 32.

H. L. (E.) 1915

HAMMERTON v. DYSART (EARL).

Lord Parker of Waddington.

some diversion and some diminution of profits be established, the question will arise whether it is of so serious a nature as to amount to a nuisance. After a careful study of the evidence I have come to the conclusion, though with considerable hesitation, that even if the respondents have succeeded in proving any diversion of traffic or diminution of profits at all, it is not of so serious a nature as to be actionable. I think it possible and, indeed, probable that the nature of the evidence adduced by the respondents at the trial was determined by what I may call the monopoly aspect of the franchise of ferry rather than, as it should have been, by the nature of an action for nuisance at common law; but, however this may be, your Lordships must take the evidence as you find it, and there appears to be no evidence that any person who formerly used the franchise ferry now avails himself of the appellants' ferry, and little if any evidence that any person who now uses the appellants' ferry would, but for the existence of such ferry, have crossed the river by the franchise ferry. Nor, again, is there any evidence of any diminution in the profits of the franchise ferry by reason of the appellants' ferry. No doubt a considerable part of the tolls taken by the franchise owner has for many years been taken from pleasure-seekers frequenting the river banks on Saturdays and Sundays. By reason of the acquisition by the London County Council of Marble Hill Park, and the opening of such park to the public in 1903, and by reason of the acquisition for the public benefit about the same time of land on the other side of the river, the number of pleasure-seekers frequenting the river banks thereafter greatly increased. The appellants' ferry was not erected until 1908, and was no doubt so erected primarily for the convenience of pleasure-seekers desiring to cross the river between Marble Hill Park and the lands held for the public benefit on the other side. If the appellants' ferry really disturbs the franchise ferry, one would expect to find evidence that between 1903 and 1908 the tolls of the ferry owner taken from pleasure-seekers on Saturdays and Sundays increased in amount, and diminished again after the opening of the appellants' ferry. Had this been proved it would be easy to infer that the diminution in profits was due to the appellants' ferry. But there is no such evidence. There is some evidence that the profits of the franchise ferry, as a whole, have for the last fourteen or fifteen years been on

the decrease, but any decrease prior to 1908 was certainly not due to the appellants' ferry, and the decrease since 1908 may well have been due to the causes which were in operation prior to 1908, such as the development of tramway and omnibus traffic. Under these circumstances it seems to me that the respondents' case breaks down, and it is therefore unnecessary to consider what amount of diminution in profits would, having regard to the various circumstances of the case, have amounted to an actionable nuisance. I may say, however, that in my opinion the reasonable inference to be drawn from the evidence is that the bulk of the traffic carried by the appellants' ferry was created by such ferry, and but for such ferry would not have crossed the river at all. The traffic was not large; indeed, the receipts from it did not exceed 12*l.* a year; any residuum therefore which may conceivably have been diverted from the franchise ferry must have been very small.

My Lords, under these circumstances it is unnecessary to inquire whether the franchise claimed by the respondents has been established; but, having regard to the course of the argument before your Lordships, I desire to make the following observation. If, as was admitted by Mr. Macnaghten, the user and practice established was such as, apart from any of the old deeds or documents, to give rise to a presumption of grant from the Crown, such user and practice could never be adequately explained by anything contained in the deeds or documents in question. The most these deeds and documents could show would be something inconsistent with the then existence of the franchise, and the Court would then have to elect between refusing to presume a legal origin for a user or practice which, without such presumption, would be illegal, and presuming an origin of later date than the deeds and documents in question. As at present advised, however, I do not find in the deeds and documents referred to anything really inconsistent with the then existence of the franchise.

LORD SUMNER. My Lords, I agree that the real question is whether there has been an actionable disturbance of the ferry to which I will assume that the plaintiffs are entitled, though I think that, whatever the jurisdiction may be to grant declarations

H. L. (E.) 1915

HAMMERTON v. DYSART (EARL).

Lord Sumner.

of rights where no other relief is given, this is not a case in which it should have been exercised.

For many centuries disturbance of a point to point ferry has been an actionable nuisance at the suit of the grantee. His remedy is analogous to that for disturbance of a market or fair, which at first took the form of an assize of nuisance (Skene J., Year Book 11 Hen. 4, 47 ; Fitzherbert, De Natura Brevium, p. 184 ; *Yard* v. *Ford* (1)), and the ground for it has long been stated to be the burthen of the public obligation of a franchise of ferry. " Si jeo aie un fery per prescription, si un auter erect un auter fery sur le mesme river prochain al ceo per que mon ferie est empaire, ceo est un nuisans al moy, car jeo sue lie a susteiner et repairer le ferie pur l'ease del leiges auterment jeo serra grievousment amerce " (Rolle's Abridgment ii., 140, pl. 4, quoting Paston J., Year Book 22 Hen. 6, 14b) (2). An action on the case for disturbing the plaintiff's ferry by establishing another near to it is to be found as early as 17 Hen. 8 (John Herne's The Pleader, 1657, pp. 101 and 190), and in later times the remedy was always by action on the case for a nuisance (Brooke's Abridgment, Action sur le Case, pl. 57). I think that it follows from the form of this action that for the recovery of damages actual damage must be proved. There must have been either a real competition and a real abstraction of tolls and not a mere carrying of a casual passenger near to the old ferry, or else an intrusion on the actual line of the old ferry, intentional and persistent and not a mere passing incident.

There is high authority for speaking of " the limits " of a ferry. Lord Macnaghten, among others, says : " Within the limits of an ancient ferry no one is permitted to carry passengers across but the owner of the ferry " : *Simpson* v. *Attorney-General* (3) ; and see, too, Mellish L.J. in *Hopkins* v. *Great Northern Ry. Co.* (4) Still, in the case of a prescriptive point to point ferry, however it may be in the case of a ferry from vill to vill, the expression " within the limits of his ferry " needs some explanation. Beyond the definition of the terminus a quo and the terminus ad quem the " limits of a ferry," when the ferry is from point to point, mean little except that

(1) 2 Saund. (1845 ed.) 171e.

(2) [The law is stated by Paston, but the reason given, in support of a distinction, by Newton.—F. P.]

(3) [1904] A. C. 476, at p. 490.

(4) 2 Q. B. D. 224.

proximity which would make the establishment of any rival ferry an actionable disturbance. Special circumstances, like the state or progression of tides, the condition of the weather, or the season of the year, may require that either terminus should be variable from time to time, provided always that the public continues to have access to it as of right. Except in this sense a point to point ferry can rarely have lateral local limits. A Royal grant may name limits up-stream and down-stream, though the object of doing so is not apparent if all comers remain entitled to be ferried across, and I do not happen to know of any such case. With a prescriptive ferry, however, this can hardly be so. The limits of a several fishery in a river are fixed up-stream and down by the grant, if it is forthcoming, and by the evidence of user if it is not, for this is a right exercised all over the area of water within them, but a right of ferry is exercised only along a substantially fixed line, and there is no prescriptive user of the residue of the area so as to fix any limits laterally.

My Lords, the point is of some importance, because the law has long distinguished between setting up a new ferry "near" to a franchise ferry and actually intruding upon it by using the same line of transit. Somewhat different considerations apply to these two cases. The pleader regularly averred, firstly, that the plaintiff was possessed of an ancient ferry, defining the same, and that the defendant carried "over, upon, within, and across" the plaintiff's ferry, and, secondly, that the defendant had carried "near to" the plaintiff's ferry. This was the practice as late as 1868 (Bullen and Leake's Precedents of Pleadings, 3rd ed.), and, as the reported cases show, had been regularly in vogue for a century earlier. To these counts the proper pleas were simply "Not possessed" and "Not guilty."

On the first count little question arises. It is forbidden to carry between the same termini as the plaintiff, directly or indirectly, and equally it is forbidden to do so in substance while contriving a colourable variation from one terminus or the other. *Tripp* v. *Frank* (1) must be regarded as a case of this kind. No authorities were cited, and the decision, which is only briefly reported, was doubted by Parke B. in *Huzzey* v. *Field* (2), and in *Pim* v.

(1) 4 T. R. 666.

(2) 2 C. M. & R. 432.

H. L. (E.) 1915

HAMMERTON v. DYSART (EARL).

Lord Sumner.

Curell. (1) Apparently the Court considered that the plaintiff charged the defendant with carrying passengers across the Humber by what was substantially the same passage as his own, though colourably varied. He disclaimed any obligation to carry to the defendant's terminus, which was two or three miles below his own. Accordingly he was held to have admitted that it was no mere colourable departure but a substantially different terminus. The question of carrying " near " his ferry does not seem to have arisen.

Such is the explanation adopted in *Huzzey* v. *Field* (2), where it is said that if Frank had been trying to evade Tripp's right by taking passengers roundabout to the same vill as Tripp took them to, Tripp ought to have succeeded. *Huzzey* v. *Field* (2) is itself a case in which the plaintiff complained that on one single occasion the defendant had carried a passenger " over, upon, within, and across " his ferry. So far as the actual decision goes, the Court of Exchequer concluded in favour of the defendant because the solitary passenger, who certainly said that he was going to Pembroke, might not have been going exclusively to Pembroke, but might also have been going to some intermediate point, or might have had some special reason for landing at Hobbes Point, where the defendant did land him on his way to Pembroke, instead of landing at Pembroke Ferry, where the plaintiff would have landed him on his way to the same destination. It seems to me that the value of *Huzzey* v. *Field* (2) lies not in what the Court decided, which was adverse to the owner of the ferry, but in the grounds upon which it would have decided in his favour if only he had formally proved at the trial something which, as it happened, nobody had had the least thought of contesting.

The facts as to the ferry in question, the Nayland Ferry, were (1.) that the route by the defendant's new crossing to Hobbes Point was shorter than by the plaintiff's old one, utilizing as it did a place which had become developed in the course of the industrial progress and changing conditions of the neighbourhood ; (2.) that between this place and the point where the defendant's route to Pembroke Town joined the plaintiff's route to Pembroke Town there was no town or vill to form the destination of travellers

(1) 6 M. & W. 234, at p. 251. (2) 2 C. M. & R. 432.

by the defendant's new route. In other words, the defendant was developing a short cut, because there had been "in recent years a considerable change of circumstances and a new condition created by the growing development" of the Pembroke side of Milford Haven, and the defendant's passenger, if compelled to use the plaintiff's ferry-boat, would have "necessarily incurred trouble and waste of time." I think it is important to notice that, in spite of this close approximation to the *Cowes Ferry Case* (1) in some of its aspects and to the facts of the present case, the Court of Exchequer would have held that Huzzey's ferry had been disturbed but for the above-stated subtle doubt of the real intention of a passenger who simply said he wanted to go to Pembroke but might have meant more than he said. The steps in the reasoning of the judgment are these: (1.) "If a new ferry be set up without the King's licence, to the prejudice of an old one, an action will lie." (2.) The gist of the action is the interruption of the grantee in the exercise of his franchise "by withdrawing the profit of passengers, which he would otherwise have had." (See, too, Blackstone's Com., iii., 219, approved by Kindersley V.-C. in *Letton* v. *Goodden* (2).) (3.) A ferry is "an exclusive right of carrying from one point to the other all who are going to use the highway to the nearest town or vill to which the highway leads on the other side. Any new ferry . . . . which has the effect of taking away such passengers must be injurious." If, for example, the new ferry, starting from the same point as the plaintiff's, should land its customers at a point on the opposite side different from the plaintiff's landing point, whence they could join the highway from the plaintiff's landing place before it reached the next vill, it is clear that, whether the defendant intended to defraud or not, his ferry would disturb the old one, for this must draw away the traffic, while the old ferry would remain subject to the burden. Huzzey would have succeeded if he had shown that the passenger "had no other object than to evade his ferry, and that the defendants were aware and must have understood that he had no other object." Unfortunately the passenger kept his motives to himself. His object may simply have been to get to Pembroke by the quickest way, not caring whether Huzzey got his obol or Field, and as Huzzey could not show that this person wanted to "evade"

(1) [1905] 2 K. B. 287. (2) L. R. 2 Eq. 123, at p. 132.

H. L. (E.) 1915

HAMMERTON v. DYSART (EARL).

Lord Sumner.

his rights and said so to the defendant's boy, the Court decided against him.

On the second count wider questions arise, some connected with the geography, some with the character and circumstances of the neighbourhood. Actual proximity is of the first importance, though it cannot be a matter of hard and fast law, nor have the Courts ever recognized any such rule of thumb for the protection of a ferry as was very early adopted in the analogous case of a market or fair, namely, a radius of seven miles. I do not, however, know of any reported decision where an action for disturbance has failed on the sole ground that so short a distance as that in question in this case is not " near " enough to the plaintiff's ferry to prove the averment. In the Brentford case a rival ferry was set up three-quarters of a mile off. At first an application to restrain it by injunction was refused, not, however, on the mere ground that it was not near enough, but that it was an objectionable monopoly in the eyes of Commonwealth judges: *Churchman* v. *Tunstal.* (1) This refusal does not show that an action on the case might not have succeeded, as Lord Abinger observes in *Huzzey* v. *Field* (2), and even the injunction was eventually granted by Lord Hale after the Restoration in 14 Charles II. (see 2 Anstruther, at p. 608). In the Bablock Hythe case (*Blissett* v. *Hart* (3)) the plaintiff's ferry is laid as being in the parishes of North Moor, Oxon, and Appleton, Berks, and the defendant's ferry as being " near " thereto and at the parishes of North Moor and Fifield. The plaintiff succeeded. I think those who know Bablock Hythe will recognize that a very substantial distance along the river must have separated these two ferries. As to the Woodside Ferry on the Mersey (*Pim* v. *Curell* (4)), actionable injury from a new ferry set up within 400 yards of the old one was treated as within the maxim res ipsa loquitur. " Supposing you established that you had the ferry," asks Abinger C.B., " can anybody doubt that on a writ of ad quod damnum the jury would have found this to be an invasion of it ? " In *Anguish* v. *Ebden*, in 1829, in the case of the Yarmouth Ferry (see [1913] 2 K. B. at p. 449), the plaintiff recovered for a disturbance of his ferry by a new one set up half a mile off. In *Blacketer*

(1) Hardres, 162.
(2) 2 C. M. & R. 432.
(3) Willes, 508.
(4) 6 M. & W. 234.

v. *Gillett* (1) and in *Doust* v. *Matthews* (2) disturbance was established respectively at 200 yards and at 630 yards distance.

Motive again has been treated as relevant to the question of disturbance in *Huzzey* v. *Field* (3), or rather the combination of the motives of the passenger, in case his real wish was to evade the plaintiff's right, and of the disturbing ferryman, if he carried that passenger knowing his said wish. I cannot follow this, and I find with some relief that so learned a judge as Wigram V.-C. says of *Huzzey* v. *Field* (3) in *Cory* v. *Yarmouth and Norwich Railway* (4), "in that case, the Court, adverting to the very scanty authority upon the subject, gave their judgment with a strong expression of hesitation as to whether they might not have come to an erroneous conclusion. They laid down many general propositions, and their opinion was not very consistent with other cases." Mellish L.J., too, in the *Nene Ferry Case* (5) regards bona fides as relevant to the case of a rival ferry accommodating new and different traffic, and this question was also raised at the trial and disposed of by the jury in *Newton* v. *Cubitt*. (6) It seems to me that what would otherwise be an actionable disturbance of a ferry cannot become justifiable merely because the defendant's motives are excellent and his character beyond reproach. The real relevance of motive must be this, both on principle and as indicated in *Huzzey* v. *Field* (3), that when the defendant acts in fraud of the plaintiff, very slight evidence of actual injury done will complete the plaintiff's case. If a man is once proved to have tried to injure another dishonestly, he may generally be credited with having first ascertained the facts and satisfied himself that his roguery will succeed.

Importance is often attached in the decisions to the source from which the traffic comes to the plaintiff's ferry and to its destination after landing from it. So it is again in *Huzzey* v. *Field*. (3) Equal importance is sometimes attached to the route by which the traffic comes. Thus at times the plaintiff's right might seem to be restricted to persons who come to his terminus a quo exclusively by some highway coeval with the assumed creation of his ferry, or to persons who come from or go to some vill, also coeval with the

(1) 9 C. B. 26.
(2) Cited 12 C. B. (N.S.) at p. 40.
(3) 2 C. M. & R. 432.
(4) (1844) 3 Hare, 593, at p. 601.
(5) 2 Q. B. D. 224.
(6) 12 C. B. (N.S.) 32.

H. L. (E.)
1915
HAMMERTON
v.
DYSART
(EARL).
Lord Sumner.

ferry, even though the ferry is a point to point ferry only. In some passages the ferry is regarded as linking together two sections of highway over land at a point where a stream interrupts their continuity, and, accordingly, as being confined to the ferriage of traffic which proceeds over that combined route. These points find expression in the judgment of the Court of Appeal in *Hopkins* v. *Great Northern Ry. Co.* (1), where stress is laid on the fact that the defendants' bridge was not erected close to the plaintiff's ferry and voluntarily, so as to be a device for evading it, but at a distance and under statutory obligation, so as to join together two portions of a highway which they had made, and made not only as a new highway but, compared with the ferry, as a new kind of highway, and it is said that if the two portions had been joined by a new ferry it would, for that reason, have been no disturbance of the old one. For myself I should have thought it would have sufficed, both here and in *Dibden* v. *Skirrow* (2), to have said : " A right of ferry is not a right to carry all passengers simpliciter, but only a right to carry them by water. Just as a ferryman cannot evade his obligation to ferry them across the water by building a bridge (*Paine* v. *Partrick* (3)), so he has no cause of action merely because another builds a bridge which gives them a passage alternative to his ferry."

My Lords, each of these cases, which illustrate the varying prominence given for the time being to one or other of these features, may be upheld, and yet no one of these features may constitute in law the essential element in an action for disturbance of a ferry. Each may evidence a disturbance of the ferry in given circumstances, but I think that the legal status of the grantee of a point to point ferry is the clue to a more comprehensive test of his right, and brings all these matters under one common principle.

The consideration for the right of the grantee of a ferry is his assumption of a perpetual obligation towards the public. He is and must remain a servant of the public. " Neglect does not, ipso facto, destroy the right to the franchise. The proceeding by quo warranto supposes the party in actual, though not in legal possession, and therefore judgment of ouster is necessary to dispossess him.

(1) 2 Q. B. D. 224. (2) [1908] 1 Ch. 41.
(3) (1690) Carth. 191.

In the case of an abuse of a franchise by negligence the Crown may repeal the grant by scire facias or quo warranto and may vest it in some other person" : Bayley J. in *Peter* v. *Kendal.* (1) At all reasonable times the ferryman must be prepared to ferry those who wish to be ferried. He must be provided with a reasonable and sufficient number of men and craft. He must charge only reasonable and uniform tolls. He must carry all peaceable wayfarers who are ready and willing to pay his toll. I know of no right in him to question them whence they come or whither they go, or to discriminate between one person and another who uses the King's highway. He cannot abandon his franchise because it is becoming less profitable or reduce his burthens by restricting his service. He cannot, without the Royal licence, erect a bridge in lieu of the ferry and thereupon give the ferry up : *Paine* v. *Partrick.* (2) He commits an indictable misdemeanour if he neglects his ferry. He may be prosecuted for a nuisance if he keeps it in a dangerous condition to the public hurt, or sued for a private nuisance by any person who can prove that he has suffered particular damage by reason of its improper state. The ferryman's breach of his public obligations forms no defence to an action which he is otherwise competent to bring, though it is ground for the determination of his privilege. On the other hand, it has been said that the Crown ought not to grant another franchise of ferry, which might prejudice an existing ferry, without causing an inquisition ad quod damnum first to be held, and, if a private person sets up such a rival ferry without the Royal licence, the Crown may proceed against him by quo warranto : *Blissett* v. *Hart* (3) ; *Huzzey* v. *Field.* (4)

My Lords, the reason why the law has thus treated the grantee of a ferry as, so to speak, chained to his oar is a public one. It is no mere desire to keep a monopolist within bounds and drive with him the hardest of hard bargains. He is a monopolist only rather figuratively, and not in the strict sense of the word. It is in order that the public may have assured to it the perpetual convenience of the ferry, a matter once hardly less important than the right to the use of highways by land, and still in many parts of the country as vital to modern needs as it was in the ages when it originated.

(1) 6 B. & C. 703, at p. 710.
(2) Carth. 191.
(3) Willes, 508.
(4) 2 C. M. & R. 432.

H. L. (E.) 1915 HAMMERTON v. DYSART (EARL). Lord Sumner.

This is a weighty consideration in a case like the present, where the rival ferry is a private venture, bound by no obligations towards the public at all. If for the sake of the convenience of one portion of the public such a venture be tolerated, there is grave risk that it may cause yet greater inconvenience to another portion of the public, should the old ferryman be starved out and, being impoverished, be no longer de facto compellable to keep up the old ferry, whatever pains and penalties may be laid upon him personally.

This subject was reviewed in 1837 with much learning, and, as I think, very correctly, by Story J. in his dissentient judgment in the celebrated case of the *Charles River Bridge* at Boston, Mass. (1) "How stands the law," he asks, "in relation to grants by the Crown of fairs, markets, and ferries? . . . . The authorities are abundant to establish, that the King cannot make any second grant which shall prejudice the profits of the former grant. And why not? Because the grant imposes public burdens on the grantee, and subjects him to public charges, and the profits constitute his only means of remuneration; and the Crown shall not be at liberty directly to impair, much less to destroy the whole value and object of its grant. . . . . When the Crown grants a ferry from A. to B. without using any words which import it to be an exclusive ferry, why is it . . . . that by the common law the grant is construed to be exclusive of all other ferries between the same places, or termini; at least, if such ferries are so near that they are injurious to the first ferry, and tend to a direct diminution of its receipts? Plainly, it must be because, from the nature of such a franchise, it can have no permanent value, unless it is exclusive; and the circumstance that during the existence of the grant, the grantee has public burdens imposed upon him, raises the implication that nothing shall be done to the prejudice of it, while it is a subsisting franchise."

My Lords, as it seems to me, the general measure of the rights of a plaintiff in an action for disturbance of a point to point ferry must, in accordance with the authorities, be sought in the practical burthen of carrying the public which the possession of his franchise throws upon him. That class of the public which his ferry accommodates in practice is a burthen on him, for he is bound to carry it on demand, and his correlative right to receive the tolls must not be

(1) (1837) 11 Peters (36 U. S.), at p. 618.

disturbed by taking a substantial part of that class away from time to time, while his standing burthen remains the same. The class may be constituted in one way or another, by residence in the locality, by common user of a definite through route, by particular business or social habit; but, however it be constituted, if it in fact resorts to the old ferry so as to be a call upon it, the old ferry has the exclusive right of ferrying the members of that class. The different elements above adverted to, the source or destination of the traffic, the object or motive of the travellers, the direction of the highway, the proximity of the new line of transit, are all tests for applying this principle, which I think reconciles them all. Hence if the plaintiff proves that the disturbing defendant has set up a ferry near to the franchise ferry, which takes away a substantial part of that class of traffic, he discharges the burden of proof which is on him.

What affirmative answer has the defendant? Down to *Newton* v. *Cubitt* (1) the only defences available were in the nature of traverses. That case first decided that the conveyance of "new traffic" constituted an affirmative defence to a count for conveying passengers "near" to the ancient ferry. The decision did not purport to rest on prior authority, but on principle deduced from the nature of ferries. No attempt was made to define new traffic. Some years later the Court of Appeal in *Hopkins* v. *Great Northern Ry. Co.* (2) added to the word "new" the words "and different." It was somewhat tentatively done, but the addition of the words "and different" is really involved in the principle of *Newton* v. *Cubitt* (1), and only makes it clear that a natural growth of old traffic is not involved in that decision, even though the increase may be very great.

Two questions seem to arise upon this plea; one is, "What are the indicia of a new and different traffic?" and the other is, "What evidence in the given case suffices to establish those indicia?" It must be remembered how very exceptional a case that of *Newton* v. *Cubitt* (1) was, where two considerable towns had grown up in a few years on land which, without modern works of reclamation, was naturally incapable of being inhabited. Further, the defendants were using a public highway, and that one of the largest in the

(1) 12 C. B. (N.S.) 32. (2) 2 Q. B. D. 224.

H. L. (E.) 1915

HAMMERTON v. DYSART (EARL).

Lord Sumner.

realm, not for the mere purpose of crossing to the opposite side, as where a link over water is made to join two ends of a broken line of thoroughfare on land, but to make a journey of considerable length along the river. Finally, the ancient ferry was a one-way point to point ferry only, and its owners relied on the word "near" (a very relative term) to bring within the ambit of their right a passage three-quarters of a mile away along the shore and 1282 yards away by road. The Court must have deemed this "near" enough to satisfy the plaintiff's averment, though it was of this very distance that Lord Campbell C.J. said, in *Matthews* v. *Peache* (1), that it was "in law not distinguishable from taking them" (that is passengers) "from a point twenty miles lower down"; otherwise it would have been unnecessary to consider the defendant's affirmative plea.

My Lords, I think it is important to observe that, although the case was tried with a jury, their verdict was only taken on the question of the intent with which the defendant set up the new ferry. It was found that the defendant's intention was to afford necessary accommodation to the inhabitants of Cubitt Town. No question of reasonable limits was put to the jury, nor of reasonableness at all, nor, in my opinion, did the Court adjudicate upon any question of the limits of the ferry, or of the supposed terms of a lost grant of a monopoly. The judgment first of all decides that the defendant was not guilty on the first count. He did not carry in the line of the old ferry actually or substantially, but on a different one altogether. Next it points out that as to carrying near to the old ferry, this was not done with intent to evade it, which of itself would apparently have been fatal to any defence. The defendant carried a new traffic. This defence was not treated merely as negativing scienter or mens rea, it was the foundation of an affirmative right; because if the plaintiff's grant did not extend to the ferriage of such traffic, then the defendant could convey it as of common right without complaint. As to mere "nearness" the judgment says, rather tautologously, "If the public convenience requires a new passage at such a distance from the old ferry as makes it to be a real convenience to the public, the proximity seems to us not actionable." It was then held that, in view of various significant facts, the traffic from Cubitt's Pier was in substance a new traffic,

(1) 5 E. & B. 546.

notwithstanding that it was used by some persons, not resident in Cubitt Town, who, but for the new ferry, would have gone to the old one. The steps in the reasoning, expressed almost in the very words of Willes J., are as follows : " The ferry exists only in respect of persons using the right of way coming to its landing-place. The ferryman has no inchoate right in respect of any persons, unless they come to this passage. He has no servitude over a large area of land forcing its occupiers to come to his landing-place and forbidding them to use the highway of the Thames as they please. Do, then, the people of Cubitt's Town come to Potter's Stairs Ferry ? Not if they can help it. To do so would be contrary to all convenience. Is the plaintiff bound to ferry them from Cubitt's Town according to their convenience ? No, he has neither the privilege nor the burden of a ferry from Cubitt's Pier. The people of Cubitt's Town are not his public, nor is his ferry their ferry. They are new traffic, and a new ferryman may carry them."

What it comes to, I think, is this. The principle is to inquire whether the new traffic is de facto part of the burthen and obligation of the old ferry. If it is not, the owner of the old ferry has no right in it. He cannot impose himself on the new public as a burthen for his private profit. This is what I take it is meant by saying that " the public convenience requires a new passage " or reasonably demands new facilities. On the other hand, a public that is part of the burthen of the old ferry is not new traffic, though as it grows it may compel the ferryman to adapt his ferry to take a larger business.

The question of new and different traffic, which is matter of defence, must be kept distinct from that of disturbing an old ferry by carrying old traffic near enough to it to cause its owner prejudice, which is matter of averment. Nearness may depend on different criteria in either case. It must always be a good deal affected by the geography and character of the locality, and by the density and distribution of the population. Old traffic does not become new and different traffic simply because it grows larger. A class of traffic heretofore wont to resort to an ancient ferry does not become new and different because it comes in motor omnibuses or on bicycles instead of on foot or on horseback, or because it comes to enjoy the scenery or play cricket, and not, as of yore, to attend a fair or

H. L. (E.) 1915

HAMMERTON v. DYSART (EARL).

Lord Sumner.

perform a pilgrimage. The mere fact that the wayfaring public would prefer to walk less and ride more, or to cross by a route which commands a more attractive view or saves a little time or gratifies some whim (however innocent), cannot of itself entitle a defendant to set up a new ferry near an old one and claim to be catering for new and different traffic.

Distinctions such as these were well pointed out by the Court of Appeal in the recent case of *General Estates Co.* v. *Beaver.* (1) As to the earlier case of *Cowes Urban Council* v. *Southampton Steam Packet Co.* (2), however rightly it may have been decided on the facts, it appears to me to be unsound in so far as the judgment rests on " a considerable change of circumstances and a new condition created by the growing development of excursion traffic " in recent years.

If mere change of circumstances and growth of population or public convenience is a justification for erecting a new ferry, why was it never suggested before the *Potter's Stairs Ferry Case?* (3) Probably there is always some change of circumstances and of public convenience, or no one would find it worth while to try to start a new ferry. Certainly it was so in *Huzzey* v. *Field* (4), for the new ferry was a short cut, saved time, and landed passengers near to a new dock and a new population. If these considerations alone sufficed, the discussion, which I have already summarized, was needless. After careful consideration of the cases, I have been unable to satisfy myself that either on principle or authority can this defence be established by mere reference to popular desires, or that the standard by which the plaintiff's rights are to be measured to-day is different in kind from that heretofore applied. Though a franchise of ferry is in effect a grant to the exclusion of others, still it is a grant which is the continuing consideration for a continuing and public service. The grant of such privileges on such terms may have been originally improvident and now be out of date, but as long as the burthen of the service continues I think its area and nature form essential elements in the definition of new and different traffic and predominate over the others. To hold otherwise seems to me to

(1) [1914] 3 K. B. 918, at pp. 931, 932.

(2) [1905] 2 K. B. 287.

(3) 12 C. B. (N.S.) 32.

(4) 2 C. M. & R. 432.

work injustice to the old ferryman and to imperil the convenience of that portion of the public which depends on the continuance of the old ferry.

My Lords, upon the facts of the present case, I think that the plaintiffs discharged the burthen of proving their averment of an actionable disturbance so far as to call on the defendants for an answer. The distance from the old ferry to the new is so short that slight evidence would suffice to prove that the latter took away custom from the former. It is true that no specific person was vouched who was accustomed to use the old ferry till he took to the new one, but common sense tells one that there must have been some such persons, few or many, and there is certainly express evidence that the defendants were quite willing to take passengers, though they purported to be natural customers of the old ferry, bound for Ham village or Twickenham Station. Against this it was competent for the defendants to show that the traffic which they carry is in substance a new and different traffic. Their pleas to the effect that, since the London County Council opened Marble Hill Park, they "have ferried persons resorting to the said park across the said river accordingly . . . . and not otherwise," and that their ferry "serves a different neighbourhood on both sides of the river," broke down. Witnesses, who were not discredited or contradicted, proved that a substantial part of the defendants' traffic was bound for Orleans Road, and not for Marble Hill Park at all. There was, however, a body of evidence, also neither discredited nor contradicted, which proved that a considerable traffic of pleasure-seekers has come into existence since Marble Hill Park was opened, who walk along the river bank from Richmond and wish to cross to Marble Hill Park at the defendants' ferry, or who come to Marble Hill Park and then wish to continue their outing on the Surrey side.

For some reason the plaintiffs took this part of the case very much for granted. If numerous pleasure-seekers had been proved to have resorted to the Surrey bank before Marble Hill Park was opened and to have crossed by the plaintiffs' ferry, I should not, for my own part, have thought that the opening of a new attraction on the Middlesex side, tempting them to turn aside before reaching the old ferry, could be used to prove "new and different traffic," still less that the increase in their numbers or the change in the

H. L. (E.) 1915

HAMMERTON v. DYSART (EARL).

Lord Sumner.

kind of conveyance by which they come to Richmond could support that plea. Nor does it seem to be material that this traffic comes along the Surrey side in the full enjoyment of a statutory right, instead of under circumstances somewhat precarious as to any right in law, though secure enough as to the actual practice. When it is a question of proving that an ancient franchise ferry exists, it is essential that the public shall be shown to have access to both termini as of right, whether the owner of the ferry owns the soil of either terminus or not, but when the question is the defence that the traffic carried by the defendant is "new and different," it cannot matter how that traffic reaches the defendant's boat, whether as of right or by licence, provided it reaches him in fact. Equally, when the traffic that he carries is traffic which formerly, somehow or other, reached the public termini between which the plaintiff plies and there lawfully demanded to be ferried over, it cannot matter whether, before reaching that public spot, the passengers crossed some stranger's land by his permission or in the exercise of a public right. There is, however, practically no evidence on the vital question whether this particular pleasure traffic was older than the opening of Marble Hill Park or not. Statements were made at your Lordships' bar, and, I do not doubt, also at the trial, to the effect that many persons, great and small, have been wont long ago to walk along the Surrey bank before ever Marble Hill Park or the defendants' ferry were heard of, and it would be affectation to doubt that this has been the case; but this is quite consistent with such persons having substantially confined their divagations to the Surrey side in days when Marble Hill, like Orleans House and York House, was still in private hands. With all respect for the contrary opinion of the Master of the Rolls, I think that it is neither admitted nor proved that the pleasure traffic was accustomed to cross the Thames in this region in any substantial measure before the defendants set up their ferry, and this is the essential point. In the absence of either proof or admission about it, I think that the decision of Warrington J. ought not to be disturbed. He had to deal with the evidence as he found it and to find the fact. There was evidence to support the defendants' plea that what they carried was a new and different traffic; the plaintiffs might have rebutted it by evidence proving that it was

really old and enlarged traffic. They contented themselves with trying to show that not all of it was pleasure traffic. I do not think that this was enough. It is not practicable for a ferryman, de facto, to catechize his passengers and turn away some while he embarks others. The character of the traffic must be looked at as a whole. If, as a whole, it is new and different, that is, such as would not resort to and be a burthen upon the old ferry in the absence of the new ferry, it is traffic which the newcomer may carry lawfully, even though some stray persons, who would have resorted to the old ferry, may pass in the crowd. I think that on this point the plaintiffs' evidence failed, though on others it succeeded, and for this reason, without adopting all his propositions of law or all the questions which he proposed to himself, I think that the judgment of Warrington J. in the defendants' favour should be restored.

LORD STRATHCLYDE. My Lords, I am prepared to assume, although not to decide, that the plaintiffs are entitled to an ancient ferry for the carriage of foot passengers and their goods across the Thames from the town of Twickenham to the manor of Ham, between the points A and B marked on the plan annexed to the pleadings. And the sole question I propose to consider is whether the defendants have invaded the plaintiffs' right of ferry. I am of opinion that there has been no invasion of the right. The evidence does not establish that a single person has crossed in the defendants' boat who would, had that boat not been plying, have crossed by the plaintiffs' ferry. Having regard to the relative situations of the two ferries and the changed conditions which have come into existence within the past ten years, it appears to me to be very unlikely that the one ferry would take the traffic of the other. No one who would naturally use the plaintiffs' ferry would ever, in my view, cross the Thames in the defendants' boat, so long as it continues to ply where it does at present.

The facts of the case are not in dispute. But the inferences to be drawn from them have given rise to considerable difference of judicial opinion. For more than 200 years there has been a ferry across the river Thames known as Twickenham Ferry. Its northern terminus is a public highway just a little below the old town of Twickenham. Its southern terminus is a public footpath some 200

H. L. (E.) 1915

HAMMERTON v. DYSART (EARL).

Lord Strathclyde.

yards in length, which crossed a field of Lord Dysart's to Ham Street, on which abuts the old straggling village of Ham. For many years there has been little change in the population or number of houses in Ham and Old Twickenham. There is nothing in the evidence to show that there ever were any regular passengers by the plaintiffs' ferry. Pleasure-seekers on Saturdays, Sundays, and Bank Holidays probably constituted its principal traffic. On fine Sundays in summer the ferryman had sometimes taken as much as 3*l.* or 4*l.* in penny fares in a single day.

It is admitted (although this is not conclusive) that there was no evidence of any diminution in the plaintiffs' drawings since the defendants commenced to ferry passengers across the river. Nor is there evidence that any one who formerly found it convenient to cross the Thames by the plaintiffs' ferry now crosses by the defendants' ferry. It was not contended that persons who would naturally have crossed by the plaintiffs' ferry, had the defendants' ferry not been in existence, now cross by the latter. Indeed, it is plain that the defendants began to carry passengers across the Thames by boat in order to meet a demand which arose naturally and spontaneously shortly after Marble Hill Park was opened to the public. That happened in 1903, and from that date until the trial of the action in 1913 it appears that the number of people using the park increased about sixfold. Many of those people came from Richmond. They were either inhabitants of that town or persons who had reached it from London and other places by various forms of vehicle. For about this time various public bodies had acquired land near the banks of the river at Petersham and Ham for the benefit of the public. And thus the people obtained a right to use, for purposes of pleasure and recreation, a stretch of land along the Surrey bank of the Thames extending from Richmond to a point above both ferries. Thus Marble Hill Park on the Middlesex side and the banks of the river on the Surrey side have been, since 1903, the resort of a large and increasing number of pleasure-seekers, principally on Saturdays, Sundays, and Bank Holidays. The desire of many of these people to cross the river from the recreation ground at Petersham to the Marble Hill Park and from the park to the recreation ground arose quite naturally. The under-keeper of the park thus graphically describes the new situation :—

"Take the case of a Saturday afternoon, and supposing there are London people there. Perhaps the men are playing a cricket match; in the summer season they bring their wives and sometimes their children down with them, and if the men are playing cricket perhaps the wives might ask me the best way to get on to the other side, because in the summer-time, looking across Petersham Vale, the view is very pretty. Of course, I naturally direct them to Hammerton's Ferry, which is the nearest. But in the old days before Hammerton's Ferry was there, I used to direct them across Marble Hill, to go down the riverside road to Champion's Ferry. That leads them down to a very old time sort of alley or river lane with brick walls on each side, and there is nothing very pretty in it."

Now if these people desirous of crossing were compelled to use the plaintiffs' ferry, that would mean a walk of 556 yards on the Surrey bank and 516 yards on the Middlesex bank, a detour of 1072 yards. The defendants accordingly found that they were frequently hailed from the Surrey side by persons who wanted to cross, and were asked by people on the Middlesex side to be ferried across to the Surrey bank. The defendants naturally met the demand which thus arose, and charge each passenger, provided he is not a hirer of their boats, a toll of one penny. By far the greater number of persons so carried across are pure pleasure-seekers; some desirous of crossing and thereafter recrossing the river, others of taking a walk from Richmond by the Petersham meadows to the defendants' ferry, crossing the river there and returning to Richmond on the Middlesex bank. In addition there is a certain number of passengers who cross on Sundays to Petersham Church from St. Margaret's and East Twickenham. They are the only people who can be called regular passengers by the defendants' boat. There may be a few others who cross from time to time in addition to the classes I have mentioned; whence they come and whither they go is not known. They cannot, however, be numerous, for in a whole year the defendants only drew some 12*l.* in ferry tolls. It is certainly not shown that any one of them would naturally have gone by the plaintiffs' ferry had the defendants not tendered their services. So far as I am able to judge from a perusal of the evidence, the defendants do not seem to have carried a single passenger who would,

H. L. (E.) 1915

HAMMERTON v. DYSART (EARL).

Lord Strathclyde.

had they not been at hand to serve him, have crossed by the plaintiffs' ferry.

I am, therefore, constrained to hold with the learned judge who tried the case that " there has sprung up a substantially new traffic, different in character from that served by the old ferry, and that the defendants' ferry was started bona fide to meet a genuine demand on the part of the public in connection with this new traffic." I freely allow that if there were here nothing more than an increase and development of the traffic which the plaintiffs' ferry has for many years carried, then the defendants, if they succeeded in tapping it, could be restrained. For the plaintiffs' rights are not confined to the amount and kind of traffic which they have hitherto carried. The plaintiffs have, I assume, the exclusive right to carry traffic, which naturally, and for reasons of public convenience, crosses the river between the termini of the ancient ferry. But I consider that their rights do not extend further. They cannot lay claim to traffic which would never have gone across had it not been for the establishment of the defendants' ferry, or even to traffic which only went by the plaintiffs' ferry because of the lack of a more convenient crossing. This is the view taken by Buckley L.J., with which I entirely agree.

My Lords, it was urged by the plaintiffs' counsel that merely to predicate of traffic that it is " new and different " does not solve the question. That in a sense is true. Traffic may be enlarged in quantity and be in that sense new; and it may be of a different quality, e.g., industrial, and not that of the pleasure-seeker, and yet it may well be within the monopoly. But if the traffic be " new and different " in this sense, that it is traffic which would not naturally go by the plaintiffs' ferry at all, and if it has been carried by it only because there was at the time no more convenient means of crossing, then it lies outside the monopoly.

It is in this latter sense that I understand the expression " new and different " was used in the cases cited to us, and notably by Willes J. in the case of *Newton* v. *Cubitt*. (1) The law there laid down by that very distinguished judge has never since been questioned. On the contrary, it has been constantly followed, and appears to me to be unassailable.

(1) 12 C. B. (N.S.) 32.

Your Lordships were, however, invited to hold that the learned judge who tried this case had misdirected himself when he stated the question on the evidence to be " whether the defendants' ferry is bona fide established for the purpose of accommodating and does accommodate a traffic substantially new in character and different from that which the old ferry was established to serve." Rightly understood, I think the question to be determined is here stated with accuracy and precision. In the sentence which follows Warrington J. clearly shows that he is using the expression " new and different " in the sense in which it was used in *Newton* v. *Cubitt* (1), for he says the traffic must be such as necessarily demands new facilities. That, I think, may with truth be predicated of the traffic complained of in the present case. It could not, in truth, be accommodated by the plaintiffs' ferry, and if the defendants' boat ceased to ply the traffic would, I think, disappear. In short, differing on this point from the Master of the Rolls, I come to the conclusion on the evidence that the new ferry does not divert traffic which would otherwise have come to the ancient ferry, although I must add that even if I had been satisfied that the defendants' ferry did divert some traffic from the plaintiffs' I would not on that account conclude that it invaded the plaintiffs' rights, for I agree with Mellish L.J. when he said, in *Hopkins* v. *Great Northern Ry. Co.* (2), that " It does not conclusively follow, as a matter of law, that because a new ferry diverts some of the traffic from an old ferry it is actionable."

It was contended on behalf of the plaintiffs in this case that proximity was the sole test to be applied in order to determine whether there had been an invasion of the plaintiffs' rights. I cannot think so. Proximity alone never has been regarded as the sole test of infringement of right in such cases as the present. Proximity is always an important element to be taken into consideration. In many cases it would be decisive, and little additional evidence would be required to establish invasion of right. But where the distance between the two ferries is, as here, substantial, where evidence of a material change of conditions has been given, where there is no evidence that any of the traffic of the old ferry has been diverted, and where it is certain that persons naturally resorting

(1) 12 C. B. (N.S.) 32. (2) 2 Q. B. D. 224.

H. L. (E.) 1915 HAMMERTON v. DYSART (EARL). Lord Strathclyde.

to the plaintiffs' ferry would be going out of their way if they went to the defendants' ferry, proximity plays no very important part in the controversy. It is idle, at all events, to contend that it can be regarded as decisive.

My Lords, agreeing as I do with the inferences drawn from the evidence by Buckley L.J. and by Warrington J., I am of opinion that this action should be dismissed with costs to the defendants here and in the Courts below.

LORD PARMOOR. My Lords, the questions to be determined in this appeal are—(1.) whether the respondents are entitled to the franchise of the ferry which they claim; (2.) what is the ambit of the franchise if it exists; (3.) whether the franchise has been disturbed by the acts of the appellants. I propose to consider in the first place the two latter points. If these are answered in favour of the appellants it is not necessary to further consider the first question.

Assuming that a ferry is vested in the respondents, it is a point to point ferry, to and fro, between the termini marked A in Twickenham and B in Ham. There is no evidence of user to any other termini. When a ferry franchise depends on evidence of user, it is limited, in my opinion, to the line between the termini proved by evidence of user, or so near thereto as to be substantially the same, and the obligation of the ferry owner to carry by ferry-boat cannot be extended beyond these limits. Originally the respondents claimed in the alternative a vill to vill ferry, but this alternative claim was not pressed. A ferry from point to point necessarily implies termini on either side to which there is a right of public access. Any member of the public desiring to cross the water by ferry-boat has a right to demand passage. In effect, a to and fro ferry from point to point gives the convenience of a right of passage across the water between the public ways on either side. It has been called a highway of a special description: *Huzzey* v. *Field*. (1) In consideration of the obligation imposed upon the ferry owner to carry all passengers demanding passage, whatever their destination may be, the ferry owner has the right to charge a reasonable toll for passage. There is no very clear definition to be found of the limits within which the right to charge a toll for passage exists,

(1) 2 C. M. & R. 432.

but I think that the obligation of the ferry owner to carry by ferry-boat should be regarded as conterminous with his right to take a toll, and that in the case of a point to point ferry, the existence and limits of which depend on proof of user, neither the obligation nor the right extends beyond the line of passage established by proof of user, or between landing places so near to those established by proof of user as to be in substance the same, so far as passage is concerned. Any person carrying passengers by ferry-boat within the line of the ferry, either colourably or directly, disturbs the franchise of the ferry owner without coming under any corresponding obligation to the public, and against such person the ferry owner has a right of action. Apart from carrying within the line of the ferry, either colourably or directly, a person may carry so near thereto as to divert the traffic which, but for such diversion, would naturally cross the river or water in the line of the ferry, and if such person thereby causes damage to the ferry owner, he is liable, as causing a nuisance to the detriment of the owner of the franchise. It is within this area that difficulty has arisen in the ferry cases, a difficulty which is illustrated by the difference of opinion which has arisen in the present case. The determination in any particular case is mainly one of fact, to be decided by reference to all the surrounding conditions and circumstances.

It would be a disturbance of the ferry franchise of the respondents to carry passengers directly between points A and B or between landing places so near to A and B as to be in substance the same, making no material difference to travellers. If the appellants are so carrying, an injunction would be properly granted, and it would not be necessary to prove damage. In my opinion the respondents have not shown that the passage afforded by the boats of the appellants is substantially on the line of the ferry.

It is material in this connection that the passage provided by the appellants is not identical at either terminus with the ferry of the respondents. The steps from which the appellants carry on the Surrey side are 556 yards from the terminus of the ferry in Ham, and the barge from which they carry on the Middlesex side is 516 yards from the terminus of the ferry in Twickenham, so that a passenger desiring to cross from the river lands on the Surrey side to Marble Hill Park on the Middlesex side would save a distance of

H. L. (E.) 1915

HAMMERTON v. DYSART (EARL).

Lord Parmoor.

1072 yards. There is no material difference between the distance saved by such a passenger in the present case and the distance saved by passengers in the case of *Newton* v. *Cubitt*. (1) There Greenwich was a common terminus on one side, and the distance in the Isle of Dogs between the Potter's Ferry Stairs and the point from which the alleged disturbing passage started was about 1280 yards. Unless proximity is so close that the carrying by the defendant in a boat is substantially a carrying on the line of ferry, it is not a decisive factor, although in all cases it is a consideration of much weight and importance.

In *Tripp* v. *Frank* (2) the plaintiff's ferry was from Hull to Barton. The defendant carried by boat from Hull to Barrow, two miles below Barton-on-the-Humber. Lord Kenyon, after expressing his opinion that there would have been a cause of action if the defendant had carried passengers a little above or below the ferry, says: "But here these persons were substantially and not colourably carried to different places."

In the leading case of *Newton* v. *Cubitt* (1) the plaintiff claimed a ferry from the Isle of Dogs to Greenwich, and, if he could have established this claim, the defendants would have committed an actionable wrong in disturbing his franchise. The plaintiff, however, failed to establish a ferry between these points, and was held only to have ferry rights in one direction from an ancient embarking place or stairs at the Isle of Dogs, called "Potter's Ferry Stairs," to Greenwich.

The second count charged the defendants with carrying near the line of ferry with the purpose of evading it. It is not material whether the carrying near the line of ferry is for the purpose of evading the ferry franchise, if there has been evasion in fact. Willes J., who gave the considered judgment of the Court, said: "The second count, charging that the defendants carried near the line of ferry for the purpose of evading it, raises another question. The owner of the ferry has a cause of action for carrying in the line of the ferry, whether it be done directly or indirectly. He has a right to the transport of the passengers using the way: and, if the alleged wrong-doer makes a landing-place near to the ferry landing-place, so as to be in substance the same, making no material difference to travellers, such a wrong-doer would be

(1) 12 C. B. (N.S.) 32. (2) 4 T. R. 666.

guilty of the wrong complained of in the second count: he would indirectly carry in the line of the plaintiff's ferry."

Although the franchise of a ferry appears to be limited to a right of carriage by boat on the line of ferry, or between landing places substantially the same as the ferry termini, and the corresponding obligation only attaches within the same limits, the owner of the ferry has a right of action against any person who carries by ferry-boat so near to the line of ferry as to cause damage to his franchise by the diversion of traffic which, but for such diversion, would naturally cross the river or water in the line of the ferry.

Mellish L.J. in the case of *Hopkins* v. *Great Northern Ry. Co.* (1) says: "There is no doubt, however, that the right of the owner of a ferry does extend somewhat beyond a mere right to bring an action against persons who have carried goods or passengers for hire by boat from one terminus of his ferry to the other."

It is within this area that difficulties have mainly arisen. It is hardly possible to do more than define the test by which the special conditions and circumstances in each case should be determined. On the one side there is the claim of the ferry owner to protection in return for the obligation of maintenance imposed upon him; on the other, the claim that the right of the ferry owner to the protection of his franchise should not extend to stereotype a substantial public inconvenience, or to sterilize any attempt to provide a new passage which would give real public convenience. The question whether the carriage of traffic by ferry-boat, outside the line of the ferry, disturbs the rights of the ferry owner depends on the nature and character of the traffic. If the traffic is such as would naturally use the public ways which the ferry serves, the diversion of such traffic, if it causes damage to the ferry, is actionable at the suit of the ferry owner. In such a case it is at least highly improbable that there would be substantial public inconvenience so long as the ferry owner fulfils his obligation to provide adequate facilities to meet the requirements of an increased demand for passage. If, on the other hand, the traffic carried, and of which complaint is made, is traffic which, owing to changed conditions, is substantially a different traffic from that which would naturally use the public ways which the ferry serves, demanding new facilities, and requiring

(1) 2 Q. B. D. 224.

H. L. (E.) 1915

HAMMERTON v. DYSART (EARL).

Lord Parmoor.

transport across the river or water between landing places which, as compared with the landing places of the ferry, make a material difference to the real convenience of passengers, the owner of the ferry has no right in respect of his ferry franchise to prevent the carriage of such traffic by ferry-boat, although it may be the fact that some passengers, who otherwise might have used his ferry and paid tolls, prefer to cross by the new route. It would be difficult to say that in undertaking his obligation to maintain the ferry the ferry owner can by any fiction have been influenced by tolls to be derived from such traffic. I agree in the caution expressed by Warrington J.: "In order to determine this question in favour of the defendants it is not sufficient to show that the volume of traffic has increased, as, for example, by reason of the increase of the population in the river-side places, they must establish that the traffic served by them is substantially a new traffic necessarily demanding new facilities."

Applying these principles to the facts of the present case, I have come to the conclusion that the appellants have not disturbed the ferry rights of the respondents, and in this respect agree with Warrington J. and Buckley L.J. I have not formed this conclusion without hesitation, having regard to the difference of opinion in the Court of Appeal.

Under an Act of 1902 the London County Council purchased certain lands in the parish of Twickenham known as the Marble Hill Estate. It was provided that these lands, when purchased by the council, should be dedicated to the use of the public for the purpose of a park for ever. In the same year an Act was passed that certain river lands bordering the Thames on the Surrey side, opposite the Marble Hill Park, should be held for the perpetual use thereof by the public for exercise and recreation. Since the passing of the above Acts the public have resorted in considerable numbers to the river lands on the Surrey side, and also to the Marble Hill Park on the Middlesex side, especially during the summer months. In 1908 the London County Council granted to the appellants a licence to moor a barge for the purpose of letting on hire boats, canoes, and punts for the use and convenience of persons resorting to the park, subject to the conditions therein set out. Under the terms of the agreement the appellants moored a barge on the banks of the Thames at Marble Hill Park. They have carried passengers across

the Thames between the barge and steps on the Surrey bank which had been erected some thirty years ago by the Thames Conservancy.

It seems clear that the appellants bona fide provided a boat to cross the Thames between Marble Hill Park and the river lands on the Surrey side to meet the requirements of a new traffic, and not as a colourable diversion of traffic, from the ferry of the appellants. It is also clear that there were changed conditions, but the question still remains whether these changed conditions resulted in the creation of a substantially different traffic, requiring new facilities for transport by boat, and such as would not naturally use the highways which the ferry serves.

In the case of *Newton* v. *Cubitt* (1) Willes J. says: "If the franchise of a ferry is established for facility of passage, and if the monopoly is given to secure convenience of accommodation, a change of circumstances creating new highways on land would carry with it a right to continue the line of those ways across a water highway." I do not think that Willes J. intended to say that no change of circumstances, which conduced to a substantially different traffic, should be considered in determining the rights of a ferry owner, unless there has been a creation of new highways. In my opinion it would be inconsistent with the principles which he laid down to imply such a limitation. On this point, in the case of *Hopkins* v. *Great Northern Ry. Co.* (2), Mellish L.J. says: "The first grantee of a ferry is supposed to have represented to the Crown that it would be for the public advantage that a ferry should be established in a particular locality, and then, in consideration of the grantee undertaking perpetually to keep up the ferry, the Crown has granted to him the exclusive right of ferrying within certain limits. There is nothing in the nature of this transaction which would lead me to believe that the Crown intended to guarantee, or had power to guarantee, the grantee of the ferry against changes of circumstances and future discoveries of an entirely different description of transit by which ferrying might be superseded." This same matter was referred to in the recent judgment of the Court of Appeal in *General Estates Co.* v. *Beaver*. (3) I find myself in agreement with the judgment of Lush J., who formed a minority of the Court.

(1) 12 C. B. (N.S.) 32. (2) 2 Q. B. D. 224.
(3) [1914] 3 K. B. 918.

H. L. (E.) 1915

HAMMERTON v. DYSART (EARL).

Lord Parmoor.

There is some question whether, prior to the Act of 1902, there was any right of way along the towing-path on the Surrey side, but I do not desire to place undue weight on this consideration, and assume that the change of circumstances in the present case does not include the creation of new highways.

The question, therefore, is open whether the traffic which has sprung up since 1902 is substantially different from the traffic naturally using the public ways leading to the ferry of the respondents and requiring new facilities in the real interest of the passengers. If the traffic carried by the appellants comes within this category, its carriage by the appellants does not constitute an injury to the ferry franchise of the respondents, or give the respondents a right of action against the appellants. I agree with Mr. Lawrence that if the traffic so carried is to be regarded as merely an increase of the traffic naturally served by the ferry of the respondents, it would not be a substantially different traffic requiring new facilities, and the respondents, as owners of the ferry, would, on proof of damage, be entitled to succeed in their action. The evidence, however, shows that the traffic which the appellants carry by boat is in substance a different traffic, which has sprung up since the dedication of Marble Hill Park and the riverside lands to the public, and is not an increase of traffic which might naturally be expected to use the public ways leading to the ferry. I attach much importance to the evidence of Mr. T. A. Smith, who was called on behalf of the respondents at the trial. He was unable to name any one in Ham who used the appellants' boat, and said that the greater number of those who did use the appellants' boat were visitors, and that it was very seldom used by the inhabitants of Ham and Petersham. The mere fact of the diversion of some traffic which might otherwise have crossed by the line of the ferry is not in itself an actionable wrong, if in substance the appellants are carrying a new traffic different from that which the ferry serves. Traffic to a small extent was diverted in the case of *Newton* v. *Cubitt*. (1) If there is any proof of actual diversion of traffic, it is to an extent which does not affect the right of the parties.

It is unnecessary to go into further detail, since I accept the con-

(1) 12 C. B. (N.S.) 32.

clusion of Warrington J., who heard the evidence and saw the various witnesses, and did not misdirect himself, in favour of the appellants.

In the case of *Newton* v. *Cubitt* (1) Willes J. says: "If the public convenience requires a new passage at such a distance from the old ferry as makes it to be a real convenience to the public, the proximity seems to us not actionable." Mr. Lawrence pointed out in his argument that every new passage might be in some sense a convenience for the public, and that in this way the owner of a ferry might gradually lose the advantage of the franchise granted to him in consideration of his obligation to maintain the ferry. The answer is, in the words of Willes J., that the inconvenience to the public must be substantial, and that the new passage must be of real convenience, and when these conditions co-exist it can hardly be said that the traffic is of a character which would naturally use the public ways which the ferry serves, and not a substantially new and different traffic within the true meaning of these words. I think it is a substantial inconvenience to passengers desiring to cross between the river lands and Marble Hill Park to be forced to go round a distance of over 1000 yards, and that this traffic, with good reason, demands new facilities such as the appellants are providing, and reasonably may object to being forced to go round by the line of ferry.

My Lords, it is sufficient to determine the appeal in favour of the appellants that there has been no disturbance of the franchise of the ferry. It becomes therefore unnecessary to consider the further question whether the respondents have proved their claims to a point to point ferry to and fro between the points A and B.

Order of the Court of Appeal reversed and judgment of Warrington J. varied by striking out the declaration as to the plaintiffs' title and subject to such variation restored. The respondents to pay the costs in the Courts below and also the costs of the appeal to this House.

Lords' Journals, July 23, 1915.

Solicitors for appellants: *Withers, Bensons, Birkett & Davies.*
Solicitors for respondents: *Horne & Birkett.*

(1) 12 C. B. (N.S.) 32.

[PRIVY COUNCIL.]

J. C.*
1915
Nov. 10.

THE ROUMANIAN.

ON APPEAL FROM THE HIGH COURT OF JUSTICE, PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

(In Prize.)

Prize Court—Enemy Cargo in British Ship—Outbreak of Hostilities—Diversion to British Port—Part Cargo discharged into Oil Tanks—Liability to Seizure.

A cargo of petroleum oil in bulk, owned by a German company, was shipped at a neutral port on board a British vessel bound for Hamburg. The vessel reached the English Channel after the outbreak of hostilities between Great Britain and Germany and was diverted by her owners to Purfleet, where, under their orders, she proceeded to discharge the oil into tanks on shore. When the larger part of the oil had been so discharged the whole cargo was seized as prize. It was subsequently condemned as lawful prize and as droits of admiralty :—

Held—(1.) that the cargo was not immune from condemnation by reason of having been shipped in a British vessel before the outbreak of hostilities; (2.) that the jurisdiction of the Prize Court extended to the oil seized while in the tanks, since that jurisdiction depended not upon the situation of the oil when seized, but upon the fact that it was seized as prize ; (3.) that, the whole cargo having become liable to seizure and condemnation upon the outbreak of hostilities, the oil discharged into the tanks did not cease to be so liable by reason of the discharge, and that this was the case whether or not the tanks formed part of the port.

The Ooster Eems (1784) 1 C. Rob. 284, n., discussed and explained.

Appeal from a decree of the Prize Court (England), December 7, 1914 ; reported [1915] P. 26.

The appeal related to a cargo of about 6264 tons of petroleum oil shipped on July 24, 1914, at Port Arthur, Texas, on board the British tank steamer *Roumanian* for delivery at Hamburg.

The cargo was the property of the appellants, the Europäische Petroleum Union, a company incorporated and registered in

* *Present:* Lord Mersey, Lord Parker of Waddington, Lord Sumner, Lord Parmoor, and Sir Edmund Barton.

Germany. On August 4, 1914, when the vessel was in the English Channel and bound for Hamburg, war broke out between Great Britain and Germany. At the suggestion of the Lords Commissioners of the Admiralty the owners of the vessel diverted her to a port in the United Kingdom (Dartmouth) for orders. From that port they ordered her to proceed to Purfleet and there to discharge the oil into tanks belonging to the owners of the wharf. The vessel was moored to the wharf at Purfleet on August 21, 1914, and proceeded to discharge the oil into the tanks, which were situated about 100 to 150 yards from the vessel, by means of pipe lines worked by the ship's pumps. The oil could not be removed from the tanks without the sanction of the Customs. On August 22, 1914, when the greater part of the oil had been so discharged, a letter from the Custom House officer at Gravesend addressed to the master was delivered on board, stating that the whole cargo was "placed under detention." The discharge into the tanks was completed on the following day.

On September 15, 1914, a writ was issued on behalf of the respondent, the Procurator-General, against the *Roumanian* and her cargo for the condemnation of the cargo as prize and droits of admiralty. The writ was served by attaching it to the tanks.

The appellants claimed the release of the cargo, or that it should not be condemned, or, if ordered to be sold, that the proceeds should be paid into Court and should remain in Court till the termination of the war.

The action was tried by the President of the Probate, Divorce, and Admiralty Division (Sir Samuel Evans), who, by a considered judgment delivered on December 7, 1914, condemned the whole cargo as lawful prize and droits of admiralty.

1915. July 21, 22, 26, 28. *Maurice Hill, K.C.*, and *C. R. Dunlop* (*Balloch* with them), for the appellants. The notice of August 22, 1914, that the cargo was "placed under detention" did not constitute a seizure as prize. In any event a large part of the oil had at that time been pumped into the tanks, and that part was consequently seized on land. Except in the case of a seizure by a naval force on shore, goods seized upon land are not within the jurisdiction of the Prize Court nor subject to condemnation as prize. The effect

J. C. 1915 THE ROUMANIAN.

of the Order in Council of 1665, set out in *The Rebeckah* (1) and referred to by the learned President in *The Miramichi* (2), has been misapprehended. In that Order goods in port means goods afloat in port. Moreover, the object of the Order was not to define the limits of prize jurisdiction but to lay down the respective rights of the Crown and of the Lord High Admiral: Rothery's Prize Droits, pp. 13, 14. (3) Neither the terms of the Order in Council of August 5, 1914 (4), nor the forms prescribed by the Prize Court Rules are consistent with, or applicable to, the seizure of goods upon land. There is considerable authority of jurists that prize jurisdiction is confined to the high seas and territorial waters: Halleck's International Law, vol. 2, ch. 22, s. 2 (4th ed., p. 98); Oppenheim's International Law, vol. 2, art. 145 (2nd ed., p. 182); Westlake's International Law, 2nd ed., part 2, p. 145; Story on Prize (Pratt's ed., 1854), pp. 58, 59. There are no reported cases of seizure of goods upon land, except where they have been taken by a naval force acting ashore. In *Lindo* v. *Rodney*, reported in a footnote to *Le Caux* v. *Eden* (5), Lord Mansfield elaborately considered the foundation and nature of prize jurisdiction, and, in justifying a seizure of goods upon land by a naval force, said, "the prey is, as it were, killed at sea, and taken upon land." In *The Two Friends* (6) Sir W. Scott was satisfied that there could have been no valid seizure upon land unless there had been a capture at sea. He said: "I know no other definition of prize goods than that they are goods taken on the high seas, jure belli, out of the hands of the enemy; and there is no axiom more clear than that such goods, when they come on shore, may be followed by the process of this Court." The learned judge in that case distinguished *The Ooster Eems* (7), pointing out that Lord Thurlow had there stated that the goods then in question had not been captured at sea, and upon

(1) (1799) 1 C. Rob. 227, at p. 231; 1 Eng. P. C. 118, at p. 121.

(2) [1914] P. 71, at p. 81.

(3) A report made in 1857 by Mr. H. C. Rothery, C.B., Registrar of the High Court of Admiralty (1853 to 1878), to the Lords Commissioners of the Treasury, first printed in 1915 and published under the above title by the authority of H. M. Stationery Office.

(4) Manual of Emergency Legislation, 1914, p. 248.

(5) (1781) 2 Doug. 594, at p. 612, n.

(6) (1799) 1 C. Rob. 271; 1 Eng. P. C. 130.

(7) 1 C. Rob. 284, n.; 1 Eng. P. C. 136, n.

that ground had held that they could not be seized upon land. [*The Hoffnung* (No. 3) (1), *The Charlotte* (2), and *Brown* v. *The United States* (3) were also referred to.] The learned President on the present point cited two cases mentioned in Mr. Rothery's report, namely, *The Berlin Johannes* (4) and *The Marie Anne.* (5) In the first of those cases the ship was captured in the Thames. The second is distinguishable in that the contract of carriage was subsisting, the goods having been warehoused temporarily during repairs to the ship. Moreover, Mr. Rothery's report was made solely with the object of ascertaining what proportion of the proceeds of captured goods had in practice been given to the captors, and the facts of the cases are only stated so far as they are relevant to that question. In *The Thalia* (6) the ship was ashore below high water mark, but in any case the seizure was by a naval expedition. The Inner Temple library contains bound records (formerly belonging to Dr. Lushington) in some thousand appeals from British and Colonial Prize Courts, and it is remarkable that, with the possible exception of one case from Ceylon, which was reversed upon appeal, not one of those cases relates to a seizure upon land.

But even if the right to seize goods in port is not limited to goods afloat in port, the tanks did not form part of the port. In the passage in Hale's De Portibus Maris (Hargrave's Law Tracts, pp. 46 et seq.), referred to by the President, the author is not considering the limits of prize jurisdiction, but is describing the legal conception of a port in its widest sense. He recognizes that for certain purposes the description is too wide, as at p. 76 he speaks of "the very port, viz. that part of the port where ships come to unlade their goods." So far as prize jurisdiction is concerned "port" includes nothing above high water mark. [Port of London Act, 1908 (8 Edw. 7, c. 68), Sched. V., was referred to.] If the tanks are to be regarded as a warehouse the effect of s. 493 of the Merchant Shipping Act, 1894, as to the preservation of the

(1) (1807) 6 C. Rob. 383; 1 Eng. P. C. 583.
(2) (1807) 6 C. Rob. 386, n.; 1 Eng. P. C. 585, n.
(3) (1814) 8 Cranch, 110.
(4) Rothery, p. 125.
(5) Rothery, p. 126.
(6) (1905) 2 Russian and Japanese Prize Cases, 116.

J. C. 1915

THE ROUMANIAN.

shipowner's lien is not to make the possession of the warehouseman the possession of the shipowner.

Further, enemy goods shipped upon a British ship before the outbreak of war are not liable to condemnation in a British Prize Court. This contention was not developed in the Court below, since the learned President had already rejected it in *The Miramichi* (1) and in *The Aldworth*. (2) The only goods liable to seizure under international law are enemy goods upon enemy ships: Westlake's International Law, part 2, p. 145; Lawrence's Principles of International Law, 4th ed., p. 461; Cohen on the Declaration of London, p. 139; Taylor's International Law, p. 723; Bentwich's War and Private Property, p. 79. The Declaration of Paris, the Declaration of London, and the Hague Conventions are all based upon the assumption that enemy goods in national ships are immune from seizure. The protection of the flag applies after the outbreak of hostilities. The forms given in the Prize Court Rules are drawn up in accordance with the established practice, but there is no form applicable to a seizure of goods in a British ship. So too the Board of Trade circular issued to shipowners on August 15, 1914 (3), is entirely inconsistent with the existence of the right, which is also ignored by the Naval Prize Manual, 1904. If the right exists enemy goods shipped before the outbreak of war in a British ship are placed in a worse position than if shipped in a neutral vessel. Indeed, having regard to the days of grace allowed to enemy ships to leave British ports, enemy goods may be in a better position in an enemy ship than in a British ship. So far as the object of seizure is to prevent enemy goods from reaching their owner, that object is attained by the common law rule and the statutory provisions against trading with the enemy. There is no case in the English Prize Cases, nor in Pritchard's Digest of 1848, which deals with the seizure of enemy goods in a British ship, and until the recent decision in *The Juno* (4) there is no reported case of a claim for freight by a British shipowner in respect of enemy goods seized upon his ship. In *The Venus* (5), mentioned in Mr. Rothery's report and

(1) [1914] P. 71.
(2) Oct. 26, 1914, unreported.
(3) The purport of this circular appears from the judgment at p. 129.
(4) (1914) 112 L. T. (N.S.) 471.
(5) Rothery, p. 129.

referred to by the President, it does not appear that the question was argued ; further, the seizure was made at a time when breaches of international law took place by way of reprisals. In both *The Conqueror* (1) and *The Mashona* (2), cited by the President in his judgment in *The Miramichi* (3), the goods had been shipped after the outbreak of war. In the Russian and Japanese war both nations observed the rule contended for : see Russian regulations, Russian and Japanese Prize Cases, vol. 1, Appendix A, p. 311 ; Japanese regulations, Russian and Japanese Prize Cases, vol. 1, Appendix B, p. 431. The French regulations in the present war also accord with the appellants' contention : see Manual of Emergency Legislation, Supplement No. 3, pp. 574, 575.

Sir Edward Carson, A.-G., Sir Erle Richards, K.C., and *T. Mathew*, for the Procurator-General, were not called upon.

Nov. 10. The judgment of their Lordships was delivered by

Lord Parker of Waddington. This appeal relates to the cargo ex steamship *Roumanian*. The relevant facts are quite simple and are not in dispute.

The *Roumanian* is a British ship, and on August 4, 1914, the day on which war broke out between this country and Germany, was on a voyage from Port Arthur, Texas, to Hamburg with a cargo of some 6264 tons of petroleum belonging to the Europäische Petroleum Union, a German company. On the same day the Admiralty through the secretary of Lloyd's suggested to the owners that the ship should be diverted to some port in the United Kingdom, and the owners accordingly instructed the master to proceed to Dartmouth for orders. The ship arrived at Dartmouth on August 14, 1914.

On August 15 the Board of Trade issued a notice containing recommendations with regard to the treatment of cargoes belonging to an enemy in ships diverted from their original ports of destination. These recommendations appear to their Lordships to be so conceived as in no way to prejudice the liability (if any) of such cargoes to be seized as prize. It was recommended that the cargo should be landed at a dock, legal quay, or sufferance wharf, either in the port

(1) (1800) 2 C. Rob. 303. (2) (1900) 10 Cape Times L. R. 163.
(3) [1914] P. 71.

J. C. 1915 THE ROUMANIAN.

at which the steamer had arrived or in some other safe port, and warehoused subject to shipowners' and other charges until sale or disposal could be arranged for. If sold, the proceeds should be held for subsequent distribution to those entitled to the cargo, subject to shipowners' and other charges which might at law have priority to the claims of the persons entitled to the cargo or its proceeds. Obviously, if the cargo were liable to seizure as prize, seizure followed by condemnation in the Prize Court would entitle the Crown either to the cargo itself or the proceeds thereof, subject to such shipowners' or other charges as might, by law, take precedence of the Crown's interest.

On August 20 the *Roumanian* proceeded to London, arriving at Purfleet at noon on August 21. Before her arrival arrangements had been made to warehouse the petroleum in the tanks of the British Petroleum Company, Limited, at Purfleet, and permission had been obtained from the Custom House authorities for its discharge into these tanks. When so discharged the petroleum would be in the custody of the Custom House authorities in the sense that it could not be removed therefrom without their sanction.

The work of discharge accordingly commenced at 12.15 P.M. on August 21, the petroleum being pumped into the tanks, which were situated some 100 to 150 yards from the wharf at which the vessel lay. Meanwhile the Custom House authorities took samples in order to test the specific gravity of the oil and ascertain whether or not it was dutiable. About 7 P.M. on August 22 a letter from the Custom House at Gravesend was delivered on board the *Roumanian*, addressed to the master, stating that the cargo of about 6264 tons of petroleum was placed under detention. This letter was not received by the master till 11 P.M. Roughly speaking about 1140 tons of oil remained undischarged at 7 P.M. and 570 tons at 11 P.M. on August 22. Notwithstanding the letter above referred to, the work of discharging the oil continued. It was completed long before the writ in these proceedings, which did not issue until September 19, and was served by affixing the same to the tanks in which the petroleum was then warehoused.

It will be observed that the letter giving notice of the detention of the cargo did not refer to its detention as prize, and it was accordingly argued on behalf of the appellants that there was no

effectual seizure as prize until the writ in these proceedings was affixed to the tanks containing the petroleum. It is clear, however, that the Custom House is the proper authority to seize or detain, with a view to its condemnation as prize, any enemy property found in a British port. It is equally clear that the letter in question was intended to operate, and must have been understood by all concerned as intended to operate, as such a seizure. No other possible intention was suggested. Under these circumstances their Lordships are of opinion that the cargo was effectually seized as prize upon the delivery of the letter. The point, however, is of little importance in the view their Lordships take of the points of law, which will be dealt with presently, for if there was no seizure by delivery of the letter there was admittedly a good seizure when the writ was served.

Under these circumstances three points were raised by counsel for the appellants. They contended, first, that, so far as the petroleum was not afloat at the date of seizure, the Prize Court had no jurisdiction; secondly, that even if the Prize Court had jurisdiction, it ought not to have condemned the petroleum so far as at the date of seizure it was warehoused in the tanks of the British Petroleum Company, Limited, and no longer on board the *Roumanian;* and, thirdly, that enemy goods on British ships at the commencement of hostilities either never were, or, at any rate, have long ceased to be, liable to seizure at all. Obviously, if the last point is correct, it is unnecessary to decide the first two points. Their Lordships, therefore, think it desirable to deal with it at once.

The contention that enemy goods on British ships at the commencement of hostilities are not the subject of maritime prize was not argued before the President in the present case. It had already been decided by him in *The Miramichi.* (1) Their Lordships have carefully considered the judgment of the President in the last-mentioned case, and entirely agree with it. The appellants' counsel based their contention on three arguments. First, they relied on the dearth of reported cases in which enemy goods on British ships at the commencement of hostilities have been condemned as prize, emphasizing the fact that in the case of *The Juno* (2) no authority could be found for the right of the master of a British ship on which

(1) [1915] P. 71. (2) 112 L. T. 471.

J. C. 1915 THE ROUMANIAN.

enemy goods were seized as prize to compensation in lieu of freight, though if such goods were properly the subject of prize the question must constantly have arisen. Secondly, they laid stress on certain general statements contained in text-books on international law as to what enemy goods can now be seized as prize. Thirdly, they called in aid that part of the Declaration of Paris which affords protection to enemy goods other than contraband on neutral ships and the principle underlying or supposed to underlie such Declaration.

With regard to the dearth of reported decisions, it is to be observed that the plainer a proposition of law, the more difficult it sometimes is to find a decision actually in point. Counsel are not in the habit of advancing arguments which they think untenable, nor as a general rule do cases in which no point of law is raised and decided find their way into law reports. If, on the one hand, it be difficult to find a case in which enemy goods on British ships at the commencement of hostilities have been condemned as prize, it is, on the other hand, quite certain that no case can be found in which such goods have been held immune from seizure. Further, inasmuch as by international comity British Prize Courts have in general extended to neutrals the privileges enjoyed by British subjects, we should, if this contention be correct, expect to find that enemy goods on neutral ships at the commencement of hostilities were alike immune from seizure. Their Lordships have been unable to find any authority which gives colour to this suggestion. There appears, indeed, to be no case in which for this purpose any distinction has been drawn between goods on board a neutral vessel at the outbreak of hostilities and goods embarked on a neutral vessel during the course of a war. Their Lordships, therefore, are not impressed by the argument based on the dearth of actual decisions on the point. Moreover, the decisions, such as they are, certainly do not support but, indeed, contradict the appellants' contention. It is clear, from the cases cited in *The Miramichi* (1), that enemy goods embarked on British ships during the hostilities are the subject of prize: see, in particular, *The Conqueror*. (2) In these cases the sole question decided has been the enemy character of the goods, and no stress has been laid on the time at which they were

(1) [1915] P. 71. (2) 2 C. Rob. 303.

embarked, or on whether any person concerned had or had not been guilty of the common law offence of trading with the enemy. Further, there is the case of *The Venus* referred to in Rothery's Prize Droits at p. 129.

Their Lordships have thought it desirable to examine the papers preserved in the Record Office in connection with that case, the facts of which are as follows: The *Venus* was a British ship which at the outbreak of hostilities was on a voyage to Hamburg. Its cargo had been shipped at Genoa, Ancona, and Mentone. The master, hearing of the outbreak of war and desiring to avoid the risk of his ship being captured by the enemy, put into Plymouth. The receiver of admiralty droits at Plymouth, suspecting upon information given by the master that part of the cargo belonged to enemy subjects, seized both ship and cargo. The shipowners put in a claim for the release of the ship on the ground that it was British and also for freight expenses and demurrage. The ship was ordered to be released. The claim for freight and expenses was allowed, there being a reference to the proctor to ascertain the proper amount, which was declared a charge on the cargo. The claim for demurrage was disallowed. The amount to be allowed for freight and expenses was in due course certified by the proctor, and apparently paid out of the proceeds of the cargo which had been appraised and sold under the direction of the Court. Parts of the cargo or its proceeds were subsequently claimed by and released in favour of neutrals. The residue of the cargo was condemned as the property of enemy subjects.

The case of *The Venus* appears, therefore, to be an authority against the appellants' contention. They say, truly, that the point does not seem to have been raised, but it is far more likely that the point was not raised because it was thought to be untenable than that the Court overlooked what, according to the appellants' contention, must have been a well-known principle of prize law. Further, *The Venus* is certainly an authority in support of the President's decision in *The Juno*. (1) Curiously enough, the master of the *Venus*, though a British subject, is in the proctor's report in the case of that ship referred to as the "neutral master," a fact which is only consistent with the practice of the Court in allowing

(1) 112 L. T. 471.

J. C. 1915 THE ROUMANIAN.

freight being the same whether the enemy goods were seized on neutral or on British ships.

With regard to the general statements contained in text-books on international law, it is to be observed that none of those cited in support of the appellants' contention appears to have been based on any discussion of the point in issue. On the contrary, they are for the most part based on a discussion of the effect of the Declaration of Paris. Their Lordships do not think that any useful purpose would be served by examining these statements in detail. They will take one example only, that cited from Westlake's International Law, part 2, p. 145. The author has been discussing the effect of the Declaration of Paris, and sums up as follows : " We may therefore conclude that enemy ships and enemy goods on board them are now by international law the only enemy property which as such is capturable at sea." In their Lordships' opinion the meaning of such statements must be judged by the context. They cannot be taken apart from the context as intended to be an exhaustive definition of what is or is not now the subject of maritime prize. It might just as well be argued that because the writer in the present case uses the expression " capturable at sea," he must have thought that enemy goods in neutral ships lying in British ports or harbours were, notwithstanding the Declaration of Paris, still subject to capture. Such statements are in any case more than counterbalanced by statements contained in other well-recognized authorities. Thus, in addition to the passages quoted in *The Miramichi* (1) from Dana's edition of Wheaton's International Law, it will be found that Halleck (International Law, 4th ed., vol. 2, p. 98) states that whatever bears the character of enemy property (with a few exceptions not material for the purpose of this case), if found upon the ocean or afloat in port, is liable to capture as a lawful prize by the opposite belligerent. It is the enemy character of the goods, and not the nationality of the ship on which they are embarked or the date of embarcation, which is the criterion of lawful prize. This is in full accordance with Lord Stowell's statement in *The Rebeckah* (2) of the manner in which the Order of 1665 defining admiralty droits has been construed by usage.

Passing to the appellants' third argument, that based on the

(1) [1915] P. 73, at p. 79. (2) 1 C. Rob. 227.

Declaration of Paris or the principle supposed to underlie such Declaration, it may be stated more fully as follows: Enemy goods on neutral territory were never the legitimate subject of maritime prize. Such goods could not be seized without an infringement of the rights of neutrals. The rights of neutrals are similarly infringed if enemy goods be seized on neutral ships, but the law of prize having for the most part been formulated and laid down by nations capable of exercising and able to exercise the pressure of sea power, the rights of neutrals have been ignored to this extent, that the capture of enemy goods in neutral vessels on the high seas or in ports or harbours of the realm has been deemed lawful capture. The Declaration of Paris is in fuller accordance with principle; it recognizes that no distinction can be drawn between neutral territory and neutral ships. To use Westlake's expression (International Law, part 2, p. 145), it assimilates neutral ships to neutral territory, recognizing that on both the authority of the neutral State ought (except possibly in the case of contraband) to be exclusive. So far, the argument proceeds logically, but its next step is, in their Lordships' opinion, open to considerable criticism. If, say the appellants, neutral ships are assimilated, as on principle they should be, to neutral territory, British ships ought to be in like manner assimilated to British territory. Whatever may have been the case in earlier times, no one will now contend that the private property of enemy subjects found within the realm at the commencement of a war can be seized and appropriated by the Crown. The same ought, therefore, to hold of enemy goods found in British ships at the commencement of war. This part of the argument is, in their Lordships' opinion, quite fallacious. The Declaration of Paris, in effect, modified the rules of our Prize Courts for the benefit of neutrals. It was based on international comity, and was not intended to modify the law applicable to British ships or British subjects in cases where neutrals were not concerned. Its effect may possibly be summed up by saying that it assimilates neutral ships to neutral territory, but it is impossible to base on this assimilation any argument for the immunity of enemy goods in British ships. The cases are not in pari materia. If the Crown has ceased to exercise its ancient rights to seize and appropriate the goods of enemy subjects on land, it is because the advantage to be thus

J. C. 1915 THE ROUMANIAN.

gained has been small compared with the injury thereby entailed on private individuals, or in order to ensure similar treatment of British goods on enemy territory. But one of the greatest advantages of sea power is the ability to cripple an enemy's external trade, and for this reason the Crown's right to seize and appropriate enemy goods on the high seas or in territorial waters or the ports or harbours of the realm has never been allowed to fall into desuetude. In order in the fullest degree to attain this advantage of sea power our Courts have always upheld the right of seizing such goods even when in neutral bottoms, and neutrals have always admitted or acquiesced in the exercise of that right, either because it was deemed to be a legitimate exercise of sea power in time of war, or because on some future occasion they themselves might be belligerents and desire to exercise a similar right on their own behalf. Those who were responsible for the Declaration of Paris had not to weigh the advantage to be gained by the seizure of enemy goods on neutral ships against the injury thereby inflicted on private owners, but against the demands of international comity. The fact that we sacrificed on the altar of international comity a considerable part of the advantages incident to power at sea is no legitimate reason for making a further sacrifice where no question of international comity can possibly arise.

Their Lordships hold, therefore, on this part of the case, that enemy goods on British ships, whether on board at the commencement of the hostilities or embarked during the hostilities, always were, and still are, liable to be seized as prize, either on the high seas or in the ports or harbours of the realm. It follows that the petroleum seized on board the *Roumanian* was properly condemned as prize.

The next point to be considered is the jurisdiction of the Prize Court so far as the petroleum in question was, when seized as prize, warehoused in the tanks of the British Petroleum Company, Limited, and no longer on board the *Roumanian*. The appellants contended that it is the local situation of the goods seized as prize which determines the jurisdiction of the Prize Court. If such goods be, at the time of seizure, on land and not afloat, it is not, they contended, the Prize Court but some Court of common law which has jurisdiction to determine the rights of all parties interested. In

their Lordships' opinion, this contention also fails. The chief function of a Court of Prize is to determine the question, "prize or no prize," in other words, whether the goods seized as prize were lawfully so seized, so as to raise a title in the Crown. In determining this question the local situation of the goods at the time of seizure may be of importance, but it is the seizure as prize and not the local situation of the goods seized which confers jurisdiction. If authority be needed for this proposition, it may be found in Lord Mansfield's judgment in the case of *Lindo* v. *Rodney*, reported in a note to *Le Caux* v. *Eden*. (1) It must be remembered that the jurisdiction of the Prize Court is based in every case upon a commission under the Great Seal. Lord Mansfield pointed out that in the case before him the commission under which the Court derived jurisdiction conferred jurisdiction in all cases of prize whether the goods sought to be condemned were taken on land or afloat. The same may be said of the commission in the present case. In his opinion, however, it was necessary to draw a distinction in this connection between the jurisdiction of the Court of Admiralty as a Court of Prize and its jurisdiction apart from the commission which constitutes it a Court of Prize. To give the Court of Admiralty, as such, jurisdiction the matter complained of must have occurred on the high seas, but in all matters of prize it was not the Court of Admiralty as such, but the Court of Admiralty by virtue of the commission which had jurisdiction, and this jurisdiction was exclusive, whether the goods seized as prize were on land or afloat. The only authority which, at first sight, appears to be in conflict with Lord Mansfield's decision is the case of *The Ooster Eems* (2), to which, for the reasons hereinafter mentioned, no great weight can be given.

Their Lordships will now proceed to consider the appellants' contention that even if the Prize Court had jurisdiction it ought nevertheless to have decided against the condemnation of the petroleum in question so far as it was not actually afloat on board the *Roumanian* at the time of seizure. They admitted that during the war no order for restitution or release could properly be made in favour of the German owners, but they suggested that the proper course was to hand the petroleum over to the Public Trustee or

(1) 2 Doug. 594, at p. 612, n. (2) 1 C. Rob. 284, n.

J. C. 1915 THE ROUMANIAN.

some other official for safe custody until the restoration of peace. No case where any such course has been pursued was cited.

The real question is whether the petroleum in question is, according to the law administered by Prize Courts in this country, properly the subject of maritime prize, although locally situated on shore. All enemy ships and cargoes which may, after the outbreak of the war, be found afloat on the high seas or in territorial waters or in the ports or harbours of the realm are liable to seizure as maritime prize. The petroleum in question was undoubtedly enemy property. It was undoubtedly on the high seas at and after the declaration of war. It became liable to seizure as prize as soon as war was declared. It did not cease to be so liable by being carried into Dartmouth or thence to Purfleet. It clearly remained so liable while still afloat. Did it cease to be so liable when pumped into the tanks of the British Petroleum Company, Limited ? In the course of the argument counsel were asked to suggest some intelligible reason why it should cease to be so liable. No satisfactory reason was suggested, and their Lordships have been unable to discover one for themselves. The argument of counsel was based on the assumption that no enemy goods not actually afloat at the time of seizure could be lawfully seized as prize, unless possibly they could be considered as locally situate within a port or harbour, and that the tanks of the British Petroleum Company, Limited, could not be considered as part of the Port of London. There is, in their Lordships' opinion, no ground for this assumption. The test of afloat or ashore is no infallible test as to whether goods can or cannot be lawfully seized as maritime prize. It is perfectly clear, for instance, that enemy goods seized on enemy territory by the naval forces of the Crown may lawfully be condemned as prize. The same is true of goods seized by persons holding letters of marque, and even of goods seized by persons having no authority whatever on behalf of the Crown, when the Crown subsequently ratifies the seizure. This is clear from the case of *Brown and Burton* v. *Franklyn* (1), quoted in Lord Mansfield's judgment above referred to. Brown and Burton, the masters of a vessel belonging to the East India Company, seized enemy goods on land. They had no letters of marque. The King's Proctor instituted proceedings in the Prize Court, and

(1) (1705) Carth. 474.

having obtained a condemnation of the property as prize proceeded against Brown and Burton for an account. The latter instituted proceedings at common law for a prohibition on the ground that the goods taken were on land, but relief was refused. Moreover, Lord Mansfield, in *Lindo* v. *Rodney* (1), expressly approves an admission made by counsel in that case to the effect that it would be "spinning very nicely" to contend that, if the enemy left their ship and got on shore with money and were followed on land and stripped of their money, this would not be a lawful maritime prize. If this be, as it seems to their Lordships to be, good law, the present is an a fortiori case. In the case put by counsel the landing of the goods was made by the enemy with the object of escaping capture afloat. In the present case the landing was by British subjects who had the enemy goods in their possession and did not know what else to do with them, and were pursuing a course recommended by the Board of Trade and in no way intended to prejudice the Crown's rights.

With regard to the authorities quoted in this connection they have, in their Lordships' opinion, with one possible exception, no real bearing on the point. In *The Hoffnung* (No. 3) (2) the cargo seized on shore had been landed and sold prior to the declaration of war. These goods, therefore, even if enemy goods at all, were never liable to seizure as prize. They were not, in fact, seized, nor was any proceeding taken against them, but an attempt was made to recover against the ship which had brought them the value of the goods so sold, the ship itself belonging to a neutral. This claim was rejected by the Court. It was held that unless it could be shown that the hand of capture had been employed on these goods in quality of cargo the Court could not go back to affect them in any other character. The same principle was recognized in *The Charlotte* (3), in which it was held that the proceeds of goods landed and sold prior to the seizure of the ship, and never themselves seized, were not amenable to the jurisdiction of the Court. In *Brown* v. *The United States* (4) it was decided on the facts that the goods in question were in the position of enemy goods found on American soil at the

(1) 2 Doug. 612.
(2) 6 C. Rob. 383.
(3) 6 C. Rob. 386, n.; 1 Eng. P. C. 585, n.
(4) 8 Cranch, 110.

J. C. 1915 THE ROUMANIAN.

commencement of the hostilities and not, therefore, the subject of maritime prize. That case, therefore, is clearly distinguishable from the present.

The only case which raises any difficulty is that of *The Ooster Eems*. (1) There is no satisfactory report of this case. It is mentioned in the note on p. 284 of 1 C. Rob. and in the preface to Hay and Marriott's Decisions, p. xxvii. Their Lordships have, however, examined the papers relating to it preserved in the Record Office. The *Ooster Eems* was a Prussian, and therefore a neutral vessel. She was stranded on the Goodwin Sands on a voyage from Texel to the East Indies. Before she broke up, part of her cargo was sent ashore, including some boxes of silver coin. The latter were deposited by the master with the Prussian consul at Deal. One Jeremiah Hartley, an officer of the Court of the Cinque Ports, acting under an order of attachment issued by that Court sitting as an Admiralty Court, seized and obtained possession of the goods so landed, including the boxes of silver, on behalf of the Warden of the Cinque Ports. The seizure may have been intended to be a seizure of enemy goods as maritime prize, though their Lordships have been unable to ascertain that the Court of the Cinque Ports had any jurisdiction in prize. The Warden took no proceedings either in his own or any other Court with a view to having the goods lawfully condemned. The master, therefore, obtained from the High Court of Admiralty in England a monition requiring Jeremiah Hartley and the Warden and all others whom it might concern to appear and proceed to the legal adjudication in that Court whether the goods seized were lawful prize or not. The King's Proctor subsequently intervened. Certain depositions were filed which appear to raise some suspicion that the goods were Dutch and therefore enemy goods, but there was no real evidence to that effect. The master deposed that he did not know to whom the goods belonged, and under these circumstances one would have expected that the Court would have acted on the presumption arising from the fact that the ship was a neutral ship. The Court, however, made an interlocutory decree condemning the goods on the ground that the goods, which apparently were assumed to be enemy goods, were not at the time of seizure "in a privileged vehicle or on neutral territory." All questions between the Crown

(1) 1 C. Rob. 284, n.

and the Warden were reserved. The master appealed to the Lords Commissioners of Appeal in Prize, and on that appeal the order for condemnation was discharged, not on the merits, but, in the words of the Privy Council Journals, on the ground that "the High Court of Admiralty in England, the Court appealed from, had not a jurisdiction over the goods seized and proceeded against in this cause."

The records of the Privy Council do not contain any note of the reasons which led to this decision. It would appear, however, from the case of *The Two Friends* (1) that Lord Stowell had before him some note of these reasons, for he represents Lord Thurlow as saying that "the goods in question had never been taken on the high seas, but had only passed in the way of civil bailment into civil hands, and were afterwards arrested as prize." If this be correct, it may mean that in the opinion of the Lords Commissioners it is the local situation of the goods seized as prize and not the seizure as prize which determines the jurisdiction of the Prize Court, a decision diametrically opposed to the judgment of Lord Mansfield in *Lindo* v. *Rodney* (2), which had been pronounced only three years previously. On the other hand, it may mean that the goods in question were not liable to seizure as prize because they were not on the high seas but on land, in which case Lord Thurlow was deciding the very point which he held the Court of Admiralty had no jurisdiction to decide, and he ought to have ordered the restitution of the goods to the master instead of leaving that somewhat hardly-used individual to his remedies at common law, in the assertion of which he would have in some way or other to get over Lord Mansfield's judgment to the effect that prize or no prize could only be determined in a Prize Court.

Moreover, it is almost impossible to suppose, in the then state of the authorities, that Lord Thurlow thought that to constitute lawful prize the seizure must have been on the high seas. It was already well settled that enemy ships and goods in the ports or harbours of the realm were the subject of maritime prize. It was equally well settled that enemy goods on enemy territory seized by the maritime forces of the Crown, or persons having letters of marque, could properly be condemned as prize. If, therefore, he used the

(1) 1 C. Rob. 271. (2) 2 Doug. 612, n.

J. C. 1915

THE ROUMANIAN.

expressions attributed to him by Lord Stowell some other explanation must be found. (1)

In their Lordships' opinion a reasonable explanation of the case and of Lord Thurlow's words may be found in the following consideration. It appears that the Court of the Cinque Ports in its capacity as an Admiralty Court had taken possession of the goods at the instance of the Lord Warden. There was, therefore, a matter pending in the Court of the Cinque Ports which, so far as their Lordships can discover, was not a Court of Prize. The effect of the monition was to remove this matter to the High Court of Admiralty for trial there. In so trying it the High Court would be exercising an admiralty and not a prize jurisdiction. As appears by Lord Mansfield's judgment in *Lindo* v. *Rodney* (2), in order to found an admiralty jurisdiction the complaint must be made of something done on the high seas. This explanation would fully account for the words used by Lord Thurlow, though it must be admitted that Lord Stowell took a different view as to what he meant. In any event their Lordships do not consider that *The Ooster Eems* (3) has any value as an authority. It has never been followed, and, apparently, has been cited twice only, and in each case distinguished. It is so cited and distinguished in *The Two Friends* (4) above referred to and also in *The Progress.* (5)

In the last-mentioned case certain British ships with their cargoes had been captured by the French. It is not clear whether they were captured at sea and taken into Oporto after the French occupation, or whether the French found them in the harbour of Oporto when they took possession of it. The French appear to have landed part of the cargoes which was warehoused on shore at the time when the military forces of the Crown took Oporto. It was, however, held upon the facts that there had been a capture by the French and a recapture by the military forces of the Crown of both

(1) The record in the appeal to the Lords Commissioners of Appeal in Prize in *The Ooster Eems* is to be found among a bound collection of similar records in the library of Lincoln's Inn. There is added a MS. note recording the judgment, but no reasons appear. Lord Stowell (then Mr. William Scott) seems to have appeared as counsel in the appeal; his reference in *The Two Friends* to Lord Thurlow's judgment may therefore have been from his own note.—REP.

(2) 2 Doug. 612, n.

(3) 1 C. Rob. 284, n.

(4) 1 C. Rob. 271.

(5) (1810) Edw. 210.

ships and cargoes. Lord Stowell allowed a claim for salvage on the part of the military authorities in respect of that portion of the cargoes which had been landed as well as of the ships and that portion of the cargoes remaining on board. He distinguished *The Ooster Eems* (1) on the ground, as their Lordships understand the decision, that the master of the *Ooster Eems*, in landing the goods, was acting within his authority derived from the owners of the goods, whereas the landing in the case he was considering had been effected by persons acting without authority from and contrary to the interests of the owners. The same ground of distinction would appear to be applicable to the case their Lordships are considering. The petroleum was not warehoused pursuant to any authority given by the owners, but in breach of the contract for its carriage to Hamburg, and so far as the owners were concerned this was as much a hostile act as the landing of the goods by the enemy captors in the case of *The Progress*. (2) In neither case, to use Lord Stowell's expression, was the continuity of the character of the goods landed as cargo in any way interrupted.

There are only two other cases which need to be referred to in this connection. The first is that of *The Marie Anne*. (3) In that case, at the outbreak of the war with France on May 16, 1803, the *Marie Anne*, a French ship, was under repair at Ramsgate, and certain parts of her cargo had been landed and were warehoused. Both the ship and the goods so landed were seized as prize and in due course condemned as such. There is no record of the reasons which influenced the Court. It may be that the warehouses in which the goods were deposited were considered as part of a harbour or port of the realm, so as to bring the case within the ordinary definition of goods liable to seizure as prize. It may be that the goods having been temporarily landed while the vessel was repaired were still considered as part of the cargo though not actually on board. The case, however, is clearly inconsistent with the proposition that goods seized on land cannot be lawful prize. The same may be said of the case of *The Berlin Johannes* (4), if, as would appear to be the case, the goods already landed were seized and condemned as prize.

(1) 1 C. Rob. 284, n.
(2) Edw. 210.
(3) Rothery, p. 126.
(4) Rothery, p. 125

J. C.
1915
THE ROUMANIAN.

If these decisions turned on the question whether the goods though landed were still in port they are authorities against the appellants, for no valid distinction can be suggested between a warehouse for the receipt of goods brought into harbour by sea and the tanks in which, in the present case, the petroleum was stored.

Their Lordships, therefore, have come to the conclusion that the petroleum on board the *Roumanian*, having from the time of the declaration of the war onwards been liable to seizure as prize, did not cease to be so liable merely because the owners of the vessel, not being able to fulfil their contract for delivery at Hamburg, pumped it into the tanks of the British Petroleum Company, Limited, for safe custody, and that therefore its seizure as prize was lawful. They see no reason to dissent from the judgment of the President to the effect that these tanks constituted part of the Port of London for the purpose of applying the rule relating to the liability to seizure of enemy's goods in the ports and harbours of the realm, but it is unnecessary to decide this point.

For the reasons hereinbefore appearing their Lordships are of opinion that the appeal should be dismissed, and they will humbly advise His Majesty accordingly.

Solicitors for appellants : *Ince, Colt, Ince & Roscoe.*
Solicitor for respondent : *The Treasury Solicitor.*

[PRIVY COUNCIL.]

THE ODESSA.

THE WOOLSTON.

J. C.*
1915
Nov. 11.

[CONSOLIDATED APPEALS.]

ON APPEAL FROM THE HIGH COURT OF JUSTICE, PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

(In Prize.)

Prize Court—Cargo and Pledgees—Consignees under Bills of Lading—Ownership—Bounty of Crown—Power unimpaired by Civil List Acts—Civil List Act, 1910 (10 *Edw.* 7 *&* 1 *Geo.* 5, *c.* 28).

The Prize Court does not recognize the claim of a pledgee of cargo seized as prize, the legal ownership of which was at the time of seizure in an enemy subject, and this rule applies to a pledgee who is holder of the bills of lading and is named therein as consignee of the cargo. In determining national character legal ownership is the sole criterion.

The power of bounty which the Crown was accustomed to exercise by way of redress of hardship to subjects or neutrals from decrees of the Prize Court exists unimpaired by the Civil List Acts.

Consolidated Appeals from two decrees of the Prize Court (England), made on December 21, 1914, and March 16, 1915, respectively; reported, as to *The Odessa*, [1915] P. 52.

The appellants in both appeals were Messrs. J. Henry Schröder & Co., who were bankers carrying on business in London, the firm consisting of two partners, one of whom was a natural-born British subject and the other a naturalized British subject.

The facts as to the cargo ex the *Odessa* fully appear from the judgment of their Lordships. The cargo, consisting of nitrate of soda, was sold by a Chilean firm to a German company carrying on business at Hamburg, and was shipped in May, 1914, "bound for Channel for orders." In June, 1914, the appellants accepted bills of exchange for 41,153*l.* 1*s.* 5*d.* (the price of the cargo) drawn by the sellers, and as security received and held the bill of lading which made the cargo deliverable to them or to their assigns. On August 4,

* *Present:* Lord Mersey, Lord Parker of Waddington, Lord Sumner, Lord Parmoor, and Sir Edmund Barton.

J. C. 1915 THE ODESSA. THE WOOLSTON.

1914, while the ship was on her voyage, war broke out between Great Britain and Germany, and on August 19, 1914, the ship was captured at sea. A writ was issued by the Procurator-General claiming that the ship and cargo belonged to enemies of the Crown and were liable to confiscation as lawful prize. The appellants claimed the cargo alleging that it was their property and/or as holders of the bill of lading for full value.

The President of the Probate, Divorce, and Admiralty Division (Sir Samuel Evans), having previously condemned the ship, on December 21, 1914, delivered his considered judgment as to the cargo. He held that the cargo was the property of the German company and that the appellants were merely pledgees and not entitled to have the cargo released to them ; he accordingly made a decree condemning the cargo as lawful prize.

The *Woolston* was a British steamship. The cargo consisted of nitrate of soda belonging to H. Folsch & Co., a German firm carrying on business at Hamburg ; it was shipped from two ports in Chile in June and July, 1914, for " Las Palmas for orders." The appellants accepted drafts for the account of H. Folsch & Co., and as security that firm, by letters dated July 8, 1914, sent to them the bills of lading which made the cargo deliverable to them or to their assigns. The ship being upon her voyage when war was declared, the appellants ordered her to Liverpool and indorsed the bills of lading to warehousemen at that port to take delivery of the cargo upon their account. The cargo was discharged into a warehouse, where it was provisionally detained by the Customs, and on December 31, 1914, was seized as prize. A writ was issued by the Procurator-General claiming that the cargo was the property of enemies of the Crown and was liable to confiscation as lawful prize. The appellants claimed the cargo as owners and/or as holders of the bills of lading. Alternatively they claimed that the cargo was not liable to seizure or condemnation on the ground that the *Woolston* was a British vessel. In the further alternative they claimed to be allowed certain disbursements incurred by them.

The President (Sir Samuel Evans) on March 16, 1915, following his decision in the case of the cargo ex *Odessa*, condemned the cargo on the ground that it was the property of H. Folsch & Co., and that the appellants were only pledgees. He ordered that the appellants

should be repaid their expenses in respect of freight, landing charges, superintending charges, and rent, but not their expenses in respect of marine and fire insurance, nor demurrage paid by them to the shipowners.

1915. July 19, 20, 21. *Sir Robert Finlay, K.C.*, and *Mackinnon, K.C.* (*C. R. Dunlop* with them), for the appellants. In both cases under appeal the appellants, who are British subjects, were holders of the bills of lading and were named therein as consignees of the goods. As holders of the bills they had constructive possession of the goods: *E. Clemens Horst Co.* v. *Biddell Brothers.* (1) Moreover they had a special property in the goods, since they had, subject only to the right of redemption, full power of disposition over them, including the right of sale: *Bristol and West of England Bank* v. *Midland Ry. Co.* (2) The effect of the decision in *Sewell* v. *Burdick* (3) is confined to the question whether the property in the goods had passed for the purposes of the Bills of Lading Act, 1866; further, the appellants in that case were not named as consignees.

The rule that the Prize Court does not recognize the claim of a pledgee of enemy cargo extends only to cases where there is a secret lien, and does not apply where the pledgee is named on the face of the bill of lading as consignee. A review of the authorities shows that the reasoning upon which the rule is based cannot be applied to the well-recognized commercial practice which now exists of consigning goods to bankers who accept bills of exchange upon their security: *The Tobago* (4); *The Marianna* (5); *The Belvidere* (6); *The Constantia Harlessen* (7); *The Frances* (8); *The Aina No.* 1 (9); *The Ida* (10); *The Abo* (11); *The Ariel.* (12) In *The Tobago* (4) Sir W. Scott rejected the claim of the holders of a bottomry bond upon

(1) [1912] A. C. 18.
(2) [1891] 2 Q. B. 653.
(3) (1884) 10 App. Cas. 74.
(4) (1804) 5 C. Rob. 218; 1 Eng. P. C. 456.
(5) (1805) 6 C. Rob. 24; 1 Eng. P. C. 518.
(6) (1813) 1 Dods. 353; 2 Eng. P. C. 183.
(7) (1810) Edw. 232.
(8) (1814) 8 Cranch, 418.
(9) (1854) Spinks, 8; 2 Eng. P. C. 247.
(10) (1854) Spinks, 26; 2 Eng. P. C. 268.
(11) (1854) Spinks, 42; 2 Eng. P. C. 285.
(12) (1857) 11 Moo. P. C. 119; 2 Eng. P. C. 600.

J. C. 1915 THE ODESSA. THE WOOLSTON.

the ground that they had not possession and had only a jus in rem. This decision, therefore, supports the appellants since they had constructive possession and a jus in re. The question as to a claim by a pledgee who was named as consignee in the bill of lading first arose for decision in the American case of *The Carlos F. Roses* (1); the view expressed by the two dissentient judges in that case and their reasoning are correct and should be adopted. The decision in *The Amy Warwick* (2), referred to in the last-named case, strongly supports the appellants' contention. The particular class of interest under consideration in the present appeals did not exist in commercial practice in the time of Lord Stowell, and it is highly improbable that he would have applied the rule as to a pledgee's lien to the present facts; the effect of so doing would be to injure British bankers and not the enemy owners. Until the decision in *Sewell* v. *Burdick* (3) it was doubtful whether indorsees of a bill of lading who held against an advance on the goods had not the property in the goods. The view of Lord Esher in the Court of Appeal in that case (4) had been that they had the property, and the decision of the House of Lords is limited in the manner already pointed out. The law enforced in Prize Courts must be applied to meet developments and changes in international law and in usages of trade. As an example the Prize Court now recognizes the claim of a person who has the right of stoppage in transitu to have the goods released, since that claim is supported by the Declaration of London.

Prize Courts have always recognized the shipowner's lien for freight. In *The Tobago* (5) the reason given is that "the owner of the ship has the cargo in his possession, subject to that demand by the general law, independent of all contract." The rights of the appellants at common law under their lien are at least equal to those of a shipowner in respect of freight. There would be no more difficulty in ascertaining the amount due to pledgees than exists in ascertaining the amount due for freight where questions as to pro rata and advance freight have to be dealt with. Where the advance is of the whole value of the goods no difficulty could arise. *The*

(1) (1900) 177 U. S. 655.
(2) (1862) 2 Sprague, 150 and 160.
(3) 10 App. Cas. 74.
(4) (1884) 13 Q. B. D. 159.
(5) 5 C. Rob. 218; 1 Eng. P. C. 456.

Marie Glaeser (1) and other cases as to claims by mortgagees of a ship are not applicable, as the ship's register is conclusive as to ownership under the Merchant Shipping Act, 1894.

An element in the decisions of Lord Stowell as to the claims of pledgees was that cases of hardship to British and neutral pledgees could be and were alleviated by the bounty of the Crown by payment out of the droits of the Crown. The power of the Crown to make payments of this character has, however, ceased to exist as the effect of the Civil List Act, 1837 (1 & 2 Vict. c. 2), and subsequent Civil List Acts which in effect re-enact that statute. The Prize Claims Committee, referred to by the Attorney-General before the President (2), cannot therefore effectively recommend any such payments.

Maurice Hill, K.C. (with him *Sir Edward Carson, A.-G., T. Mathew*, and *Case*), for the respondent, the Procurator-General. The authorities establish the rule that Prize Courts do not recognize the claims of pledgees of enemy cargo. No valid distinction can be drawn on the ground either that the appellants were named in the bills of lading, or that as holders of the bills they had constructive possession of the goods. At least three of the cases already cited are direct authorities against the appellants. In *The Marianna* (3) the goods were consigned to the correspondent of the claimants. In *The Frances* (4) there were two claims rejected, one of them being in respect of an advance by a pledgee consignee. *The Ida* (5) was a case of a bankers' advance, and the pledgee was named in the bill of lading; the only difference from the present cases was that the claimant was a neutral, and that is not material. Further, the American decision in *The Carlos F. Roses* (6) is precisely in point, and it is of additional importance, since it was decided in 1900, when the practice of bankers followed in that and in the present cases was fully established and known. The decision in *The Amy Warwick* (7) is based upon a finding of fact that the legal property in the goods was in the claimant and is consequently distinguishable. The ownership of the goods has always been the only test applied

(1) [1914] P. 218.
(2) See [1915] P. at p. 58.
(3) 6 C. Rob. 218; 1 Eng. P. C. 456.
(4) 8 Cranch, 418.
(5) Spinks, 26; 2 Eng. P. C. 268.
(6) 177 U. S. 655.
(7) 2 Sprague, 150 and 160.

J. C. 1915 THE ODESSA. THE WOOLSTON.

by Prize Courts, and was adopted by art. 58 of the Declaration of London after the subject had been referred to a committee. [In addition to the cases referred to on behalf of the appellants reference was made to *The Nigretia* (1) and *The Rossia* (2); also to Pratt's Story on Prize Law, 1854, p. 52.]

A shipowner's claim for freight upon captured goods is not analogous to a pledgee's claim for advances. The Court in allowing freight does not proceed upon the basis of recognizing the shipowner's lien, which does not exist since the cargo has not reached its destination, but upon the principle of allowing to the shipowner the benefit received by the captor by reason of the transport of the goods: *The Tobago.* (3) To give effect to claims of the character of those now put forward would be advantageous to the enemy owner of cargo as giving him greater credit.

The question in the appeals must be approached as a question of law uninfluenced by considerations of hardship in particular cases. The commission directed to the Prize Court requires it to decide "according to the course of Admiralty and the Law of Nations, and the statutes, rules and regulations for the time being in force." (4) At the date of the decisions in some of the older cases there appears to have been a power in the Prize Court under treaties and consequent Orders in Council to meet claims of third parties injuriously affected. This appears from a note to the report of *The Belvidere* (5), and the judgment seems to indicate that there was no such power in the Court apart from that circumstance. It is wholly immaterial to the decision of the appeals whether or not the power in the Crown to exercise its bounty still exists. The present Civil List Act, however, appears to leave that power unimpaired. [Reference was made to Rothery's Prize Droits (6), pp. 12 to 14 and 19 to 21, as to the history of and distinction between droits of the Crown and droits of admiralty; Civil List Act, 1831 (1 Will. 4, c. 25), s. 2; Civil List Act, 1837 (1 & 2 Vict. c. 2), ss. 1 and 12; Civil List Act, 1901 (1 Edw. 7, c. 4), ss. 1 and 9; Civil List Act,

(1) (1905) 2 Russian and Japanese Prize Cases, 208.
(2) (1905) 2 Russian and Japanese Prize Cases, 43.
(3) 5 C. Rob. 218.
(4) Manual of Emergency Legislation, p. 250.
(5) 1 Dods. 353, at p. 354, n.
(6) See ante, p. 126, footnote (3)

1910 (10 Edw. 7 & 1 Geo. 5, c. 28), ss. 6 and 9; and the Naval Prize Act, 1864 (27 & 28 Vict. c. 25).]

Mackinnon, K.C., in reply. In *The Ida* (1) the true bill of lading was indorsed in blank, the claimant's name appearing only upon what was found to be a false document.

Their Lordships subsequently desired to hear the Attorney-General upon the question whether the power of the Crown to redress cases of hardship out of its bounty still existed.

July 28. *Sir Edward Carson, A.-G.* According to the true view of the Civil List Acts the Crown's power of bounty has ceased to exist. But for the reservation in s. 12 of the Civil List Act, 1837, it could not be suggested that that Act left in the Crown any rights in droits of the Crown or droits of admiralty. That reservation, however, applies only to payments to captors. The reservations contained in s. 9, sub-s. 2, of both the Civil List Acts, 1901 and 1910, merely preserve such rights as existed before the passing of those Acts. The Naval Prize Agency and Distribution Act, 1864 (27 & 28 Vict. c. 25), s. 17, shows that apart from statutory enactment the payments could not be made.

Nov. 11. The judgment of their Lordships was delivered by

LORD MERSEY. These are appeals from two judgments of the President of the Probate, Divorce, and Admiralty Division of the High Court of Justice sitting in prize.

There is very much in common in the points arising in both cases, but as the facts and arguments are not identical, it is desirable to consider each case separately.

THE CARGO EX ODESSA.

The facts in this case are as follows:—The appellants, Messrs. J. Henry Schröder & Co., are bankers carrying on business in London. The partners are Baron Bruno von Schröder, a naturalized British subject, and Frank Tiarks, a natural-born British subject. In the ordinary course of their business, the appellants had in March, 1914, agreed with a German company in Hamburg, called the Rhederei

(1) Spinks, 26.

J. C. 1915 THE ODESSA. THE WOOLSTON.

Actien Gesellschaft von 1896, to accept the drafts of Weber & Co., a firm carrying on its business in Chile, for the price of a quantity of nitrate of soda to be sold and shipped by Weber & Co. to the German company.

The drafts were to be drawn at ninety days' sight, and the appellants, upon acceptance of them, were to receive by way of security the bill of lading for the cargo, together with a policy of marine insurance. The consideration for this accommodation was to be a commission of $\frac{1}{4}$ per cent. payable by the German company to the appellants. In due course Weber & Co. shipped a cargo of nitrate on board a sailing ship called the *Odessa*, belonging to the German company, and took from the captain a bill of lading dated May 8, 1914, in which the voyage was described as from Mejillones (the port of shipment in Chile) to the "Channel for orders," and by which the cargo was made deliverable to the appellants or their assigns. This bill of lading incorporated the terms of a charterparty (of which there is no copy), and made the chartered freight payable by the consignees upon delivery of the cargo. Drafts for a total amount of 41,153*l.* 1*s.* 5*d.* (said to be the full price of the cargo) were drawn by Weber & Co. upon the appellants, and accepted by them on June 4 and 9, 1914, they receiving in exchange the bill of lading. War broke out between Great Britain and Germany on August 4, 1914, the *Odessa* being then on her voyage to the Channel. On the 19th the ship was captured on the high seas by H.M.S. *Caronia* and brought into Bantry Bay, and on the 31st a writ was issued against ship and cargo at the suit of the Procurator-General claiming condemnation of both as lawful prize. On September 5 and 10 the drafts of Weber & Co. fell due and they have been paid by the appellants. The ship was duly condemned, and no question arises with reference to her condemnation, but in respect of the cargo the appellants intervened, and by their claim alleged it to be their property as holders for full value of the bill of lading therefor and as British property not liable to condemnation. The case was heard by the learned President on December 7 and 14, 1914, with the result that he condemned the cargo on the ground that the general property was in the German company at the date of the seizure, and that the appellants were merely pledgees, and as such not entitled to any precedence over the Crown.

Their Lordships are of opinion that the learned President was right in the inferences which he drew from the facts, namely, that the general property in the cargo was in the German company, and that the appellants were merely pledgees thereof at the date of the seizure. This indeed is hardly disputable, having regard to the case of *Sewell* v. *Burdick*. (1) The property vested in the company upon the ascertainment of the goods at Mejillones, and the pledge was perfected when the appellants accepted the drafts and received the bill of lading.

The appellants indeed did not dispute the correctness of these inferences, but what they say is that, though correct, they do not justify a decree which has the effect of forfeiting their rights as pledgees. Thus the question in the appeal is whether in case of a pledge such as existed here a Court of Prize ought to condemn the cargo, and, if so, whether it should direct the appellants' claim to be paid out of the proceeds to arise from the sale thereof.

It is worth while to recall generally the principles which have hitherto guided British Courts of Prize in dealing with a claim by a captor for condemnation. All civilized nations up to the present time have recognized the right of a belligerent to seize, with a view to condemnation by a competent Court of Prize, enemy ships found on the high seas or in the belligerent's territorial waters and enemy cargoes. But such seizure does not, according to British prize law, affect the ownership of the thing seized. Before that can happen the thing seized, be it ship or goods, must be brought into the possession of a lawfully constituted Court of Prize, and the captor must then ask for and obtain its condemnation as prize. The suit may be initiated by the representative of the capturing State, in this country by the Procurator-General. It is a suit in rem, and the function of the Court is to inquire into the national character of the thing seized. If it is found to be of enemy character, the duty of the Court is to condemn it; if not, then to restore it to those entitled to its possession. The question of national character is made to depend upon the ownership at the date of seizure, and is to be determined by evidence. The effect of a condemnation is to divest the enemy subject of his ownership as from the date of the seizure and to transfer it as from that date to the Sovereign or to his

(1) 10 App. Cas. 74.

J. C. 1915 — THE ODESSA. THE WOOLSTON. —

grantees. The thing—the res—is then *his* for him to deal with as he thinks fit, and the proceeding is at an end.

As the right to seize is universally recognized, so also is the title which the judgment of the Court creates. The judgment is of international force, and it is because of this circumstance that Courts of Prize have always been guided by general principles of law capable of universal acceptance rather than by considerations of special rules of municipal law. Thus it has come about that in determining the national character of the thing seized the Courts in this country have taken ownership as the criterion, meaning by ownership the property or dominium as opposed to any special rights created by contracts or dealings between individuals, without considering whether these special rights are or are not, according to the municipal law applicable to the case, proprietary rights or otherwise. The rule by which ownership is taken as the criterion is not a mere rule of practice or convenience ; it is not a rule of thumb. It lays down a test capable of universal application, and therefore peculiarly appropriate to questions with which a Court of Prize has to deal. It is a rule not complicated by considerations of the effect of the numerous interests which under different systems of jurisprudence may be acquired by individuals either in or in relation to chattels. All the world knows what ownership is, and that it is not lost by the creation of a security upon the thing owned. If in each case the Court of Prize had to investigate the municipal law of a foreign country in order to ascertain the various rights and interests of every one who might claim to be directly or indirectly interested in the vessel or goods seized, and if in addition it had to investigate the particular facts of each case (as to which it would have few, if any, means of learning the truth), the Court would be subject to a burthen which it could not well discharge.

There is a further reason for the adoption of the rule. If special rights of property created by the enemy owner were recognized in a Court of Prize, it would be easy for such owner to protect his own interests upon shipment of the goods to or from the ports of his own country. He might, for example, in every case borrow on the security of the goods an amount approximating to their value from a neutral lender and create in favour of such lender a charge or lien or mortgage on the goods in question. He would thus stand to

lose nothing in the transaction, for the proceeds of the goods if captured would, if recovered by the lender, have to be applied by him in discharge of his debt. Again, if a neutral pledgee were allowed to use the Prize Court as a means of obtaining payment of his debt instead of being left to recover it in the enemy's Courts, the door would be opened to the enemy for obtaining fresh banking credit for his trade, to the great injury of the captor belligerent.

Acting upon the principle of this rule Courts of Prize in this country have from before the days of Lord Stowell refused to recognize or give effect to any right in the nature of a "special" property or interest or any mortgage or contractual lien created by the enemy whose vessel or goods have been seized. Liens arising otherwise than by contract stand on a different footing and involve different considerations; but even as to these it is doubtful whether the Court will give effect to them. Where the goods have been increased in value by the services which give rise to the possessory lien, it appears to have been the practice of the Court to make an equitable allowance to the national or neutral lienholder in respect of such services. In the judgment in *The Frances* (1), speaking of freight, it is said: "On the one hand the captor by stepping into the shoes of the enemy owner of the goods is personally benefited by the labour of a friend, and ought in justice to make him proper compensation, and on the other, the shipowner by not having carried the goods to the place of their destination, and this in consequence of the act of the captor, would be totally without remedy to recover his freight against the owner of the goods."

It is, however, unnecessary to deal with the question of liens arising apart from contract, the present case being one of pledge founded on a contract made with the enemy.

When the authorities are examined it will be found that they bear out the view that enemy ownership is the true criterion of the liability to condemnation. The case of *The Tobago* (2) is in point. There the claimant was a British subject. In time of peace he had honestly advanced money to a French shipowner to enable the latter to repair his ship which was disabled, and by way of security he had taken from the owner a bottomry bond. Afterwards war broke out with France and the vessel was captured. In the

(1) 8 Cranch, 418. (2) 5 C. Rob. 218.

J. C.
1915
THE ODESSA.
THE WOOLSTON.

proceedings in the Prize Court for condemnation the holder of the bottomry bond asked that his security might be protected, but Lord Stowell (then Sir William Scott), after observing that the contract of bottomry was one which the Admiralty Court regarded with great attention and tenderness, went on to ask: "But can the Court recognize bonds of this kind as titles of property so as to give persons a right to stand in judgment and demand restitution of such interests in a Court of Prize?" And he states that it had never been the practice to do so. He points out that a bottomry bond works no change of property in the vessel and says: "If there is no change of property there can be no change of national character. Those lending money on such security take this security subject to all the chances incident to it, and amongst the rest, the chances of war."

The decision in *The Mary* (1) is to the same effect. Similarly in *The Aina* (2) the Court refused to recognize or give effect to a mortgage on the ship captured, and the same point arose and was similarly decided in *The Hampton.* (3) Again, in *The Battle* (4) the Court refused to recognize a maritime lien for necessaries, a decision which was followed in *The Rossia.* (5) *The Ariel* (6) was the converse case of an attempt to obtain condemnation not of enemy goods but an enemy lien on goods; it failed on the same principle. In that case Sir John Patteson said: "Liens whether in favour of a neutral on an enemy's ship, or in favour of an enemy on a neutral ship, are equally to be disregarded in a Court of Prize."

All these cases were fully discussed by the President in *The Marie Glaeser.* (7)

Passing to cases which in their circumstances more resemble the present case, there is *The Marianna* (8), in which the Court refused to give effect to a contract of pledge on goods consigned to the agent of the pledgee. "Captors," says Sir W. Scott in that case, "are supposed to lay their hands on the gross tangible property on which there may be many just claims outstanding between other parties which can have no operation as to them. If such a rule

(1) (1815) 9 Cranch, 126.
(2) Spinks, 8.
(3) (1866) 5 Wall. 372.
(4) (1867) 6 Wall. 498.
(5) 2 Russian and Japanese Prize Cases, 43.
(6) 11 Moo. P. C. 119.
(7) [1914] P. 218.
(8) 6 C. Rob. 24.

did not exist it would be quite impossible for captors to know upon what grounds they were proceeding to make seizure. . . . . The doctrine of liens depends very much on the particular rules of jurisprudence which prevail in different countries. To decide judicially on such claims would require of the Court a perfect knowledge of the law of covenant and the application of that law in all countries under all the diversities in which that law exists. From necessity, therefore, the Court would be obliged to shut the door against such discussions and to decide on the simple title of property with scarcely any exceptions."

There is *The Frances* (1), in which the Court refused to recognize or give effect to the rights of a consignee under the bill of lading for advances against the goods to which the bill of lading related. In that case the Court laid it down that " in cases of liens created by the mere private contract of individuals, depending upon the different laws of different countries, the difficulties which an examination of such claims would impose upon the captors, and even upon the Prize Courts in deciding upon them, and the door which such a doctrine would open to collusion between the enemy owners of the property and neutral claimants have excluded such cases from the consideration of those Courts."

There is another American case, *The Carlos F. Roses* (2), in which the claim put forward by a neutral who had advanced money upon a cargo on a captured ship and who had received bills of lading covering the shipment was rejected.

It is difficult to distinguish the facts in any of the three cases last mentioned from the facts of the present claim by Messrs. Schröder & Co. Some stress was laid by the appellants upon the dissenting judgments in *The Carlos F. Roses* (2), but a perusal of those judgments will show that they proceeded upon the assumption that in the circumstances the general property in the goods had passed to the holder of the bills of lading. The case was decided before the judgment in *Sewell* v. *Burdick*. (3) Finally *The Hampton* (4) is a case in which the claim of a mortgagee on a ship was rejected.

Before adverting to the arguments by which the appellants seek to displace this weight of authority it is necessary to deal with a

(1) 8 Cranch, 418.
(2) 177 U. S. 655.
(3) 10 App. Cas. 74.
(4) 5 Wall. 372.

J. C. 1915

THE ODESSA. THE WOOLSTON.

contention put forward by them to the effect that by their title as pledgees they are clothed with a sufficient ownership to bring their case within the rule. This contention is based upon the right of sale accorded to a pledgee by the law of England by which, in the event of default by the pledgor in payment of his debt, the pledgee can sell the pledge without first having recourse to a Court of law for authority to do so. This right, it is said, creates a " special " property in the pledge in favour of the pledgee and is a right in re constituting or equivalent to ownership and distinguishable in character from the mere right in rem possessed by a lienholder. It is first to be observed of this right to sell without recourse to a Court of law that it is peculiar to the English law of pledge. It is thus precisely one of those matters which a Prize Court should leave out of consideration when applying to its decision general principles common to all systems of law to the exclusion of principles of municipal law.

The subject was very fully examined by Chancellor Kent in Lord Stowell's time in 1805 in a learned judgment declaring the decision of the Supreme Court of the State of New York (*Cortelyou* v. *Lansing* (1)) : " I believe," he says, " that there is no country at present, unless it be England, that allows a pledge to be sold but in pursuance of a judicial sentence." And secondly it is to be observed that if the right clothes the pledgees with ownership it precludes the Court from making any decree at all of condemnation.

The ownership by which a Court of Prize is guided cannot subsist both in the pledgees and in the pledgors. If it exists in the appellants in the present case no decree can be made against them, for they are British subjects, and the interest left in the enemy subject cannot be condemned, for ex hypothesi it is not an interest which includes ownership. See *The Ariel* (2), in which it was laid down that as a Court of Prize ignores a lien in favour of a neutral on an enemy's ship, so will it ignore a lien in favour of an enemy on a neutral ship.

But when the nature of the right of a pledgee to sell is examined it will be seen that the so-called " special " property which it is said to create is in truth no property at all. This has been recognized

(1) (1805) 2 Cairnes' Cases in Error, 199, at p. 202.
(2) 11 Moo. P. C. 119.

by many judges who have used the expression " special interest " as a substitute for " special property " : see *Mores* v. *Conham* (1) and *Donald* v. *Suckling*. (2)

If it were not for the somewhat unfortunate peculiarity of English terminology involved in the established use of the words " special property " when " special interest " would seem better, it is difficult to see how an argument could be maintained which would effectively distinguish pledge from lien for present purposes.

The very expression " special property " seems to exclude the notion of that general property which is the badge of ownership. If the pledgee sells he does so by virtue and to the extent of the pledgor's ownership, and not with a new title of his own. He must appropriate the proceeds of the sale to the payment of the pledgor's debt, for the money resulting from the sale is the pledgor's money to be so applied. The pledgee must account to the pledgor for any surplus after paying the debt. He must take care that the sale is a provident sale, and if the goods are in bulk he must not sell more than is reasonably sufficient to pay off the debt, for he only holds possession for the purpose of securing himself the advance which he has made. He cannot use the goods as his own. These considerations show that the right of sale is exercisable by virtue of an implied authority from the pledgor and for the benefit of both parties. It creates no jus in re in favour of the pledgee ; it gives him no more than a jus in rem such as a lienholder possesses, but with this added incident, that he can sell the property motu proprio and without any assistance from the Court.

Returning to the authorities, the appellants attempt to displace them in the following way. They say, in the first place, that Lord Stowell in *The Tobago* (3) was referring only to " secret " liens, which they interpret to mean liens not appearing on the ship's papers, and they contend that theirs was not secret for that it appears on the ship's papers, namely, on the face of the bills of lading. But when the judgment in *The Tobago* (3) is examined it will be found that Lord Stowell used the term " secret liens " as equivalent to liens created by the act of the parties as opposed to those arising under the general law merchant. Further, it cannot in the present case

(1) (1610) Owen, 123. (2) (1868) L. R. 1 Q. B. 585, at p. 613.
(3) 5 C. Rob. 218.

J. C. 1915 THE ODESSA THE WOOLSTON

be said with any truth that Messrs. Schröder's lien is disclosed on the ship's papers. It is true that the bill of lading was made out in favour of them or their assigns, but this is quite consistent with their having no charge at all, and the consignment having been made to them merely as the factors or agents of the enemy owner. The contract of pledge under which alone their claim arises, however probable in the ordinary course of commerce, is nowhere disclosed in the ship's papers. Again, such as it was, the disclosure was certainly no more than existed in the cases of *The Marianna* (1), *The Frances* (2), and *The Carlos F. Roses.* (3)

Secondly, the appellants contend that, being by virtue of the bill of lading in possession of the goods in question, there can be no reason in principle why the Court should not recognize an interest arising out of such possession just as it recognizes the carrier's possessory lien for freight. But such possession as the appellants had is not an actual possession such as forms the basis of a possessory lien at common law, but merely such possession as according to the law relating to pledge arises out of constructive or symbolical delivery. There is not, to use the words of Lord Stowell in *The Tobago* (4), that "interest directly and visibly residing in the substance of the thing itself" which is to be found in the actual possession held by a carrier. Further, it will be found that a possession similar in character to that which Messrs. Schröder had existed in several of the cases already referred to on the part of lienholders whose claims were rejected by the Court.

Thirdly, the Court was asked to accept the suggestion that the practice of making advances on the security of bills of lading had arisen after the decisions referred to had been pronounced, and that in the interest of commerce the adverse decisions should now be disregarded. With regard to this argument it is to be observed that at any rate *The Carlos F. Roses* (3) was decided at a time when the practice referred to was well known, and although the decision cannot bind an English Court, still the considered judgment of the Supreme Court of the United States is entitled to the greatest possible weight. Further, it is difficult to see how any change—if

(1) 6 C. Rob. 24.
(2) 8 Cranch, 418.
(3) 177 U. S. 655.
(4) 5 C. Rob. 218.

there has been any change—in commercial practice invalidates the reasons which led to the decisions in question.

Lastly, the appellants urged that if the Court now applies the principles illustrated by the cases above referred to very serious injustice will be done to and serious loss incurred by neutrals or subjects who, before the commencement of the war and in the normal course of business, have made advances against bills of lading. It is to be observed that similar injustice and loss, though possibly on a less extensive scale, must have been occasioned by the application of the same rules in the eighteenth and early nineteenth centuries, and similar arguments were in fact addressed to Lord Stowell as a reason why they should not be applied in individual cases. The reason why such arguments cannot be sustained is fairly obvious. War must in its very nature work hardship to individuals, and in laying down rules to be applied internationally to circumstances arising out of a state of war it would be impossible to avoid it. All that can be done is to lay down rules which, if applied generally by civilized nations, will, without interfering with the belligerent right of capture, avoid as far as may be any loss to innocent parties. It is precisely because the recognition of liens or other rights arising out of private contracts would so seriously interfere with the belligerent right of capture that the Courts have refused to recognize such liens or rights in spite of the hardship which might be occasioned to individuals from such want of recognition. It is said that in Lord Stowell's time there was a possibility of redressing any individual hardship which might be caused to neutral or subject by an appeal to the bounty of the Crown, and that in some way or other the Crown has lost its power of bounty in the matter. It is true that Lord Stowell, when pressed with the individual hardship of decisions he was about to pronounce, sometimes referred to the fact that any apparent injustice might be met by an exercise of the Crown's bounty: see *The Belvidere* (1) and *The Constantia Harlessen.* (2)

Whether his judgments were in any way based on that consideration or whether they would not have been the same if the possibility of the exercise of the Crown's bounty had not existed is an arguable point.

(1) 1 Dods. 353. (2) Edw. 232.

J. C. 1915 — THE ODESSA. THE WOOLSTON.

In their Lordships' opinion, however, it is unnecessary to decide this point, for after hearing the Attorney-General they have come to the conclusion not only that the Crown had and was accustomed to exercise a power of bounty by way of redress of hardships, but that such power still exists unimpaired.

Perhaps the most notable instance of the exercise of such power was the Order in Council made at the commencement of the war with Denmark in 1807. It was thereby ordered that in case any advances should have been made before the then late embargo (namely, the 2nd of September then last passed) by any British subject upon the credit and security of any ship, freight, or goods belonging to Danish subjects which might be condemned as prize to His Majesty, the amount of such advances so actually made (but without further compensation) should be paid to the British subjects out of the proceeds of the property so condemned upon the credit of which the advances were respectively made upon due proof thereof to the satisfaction of the High Court of Admiralty. If the Crown could order this generally, it must also have had the power to order it in particular instances. Further, if it could make such an order in favour of British subjects, it must also have had the power to make it in favour of neutrals, and circumstances can easily be imagined in which the exercise of such a power in favour of neutrals might as a matter of policy be deemed desirable.

If the Crown had and was accustomed to exercise the power of redressing hardship by way of bounty, such right must still exist unless taken away by Act of Parliament, and it must be remembered that the Crown's prerogative can only be abridged by express words or necessary implication. The argument of the Attorney-General to the effect that the power in question has ceased to exist is solely based on the effect to be given to the statutes which have been from time to time passed in reference to the Civil List. The first Civil List Act which affects droits of admiralty and droits of the Crown is the Act of 1 Geo. 4, c. 1. By s. 2 of that Act the produce of certain Crown revenues (which did not include droits of admiralty or droits of the Crown or other small casual revenues) were for the life of King George IV. carried to the Consolidated Fund. It was provided that an account of all moneys to be received in respect of the casual revenues of the Crown including droits of admiralty and droits

of the Crown and of the application thereof should annually be laid before Parliament. By s. 2 of 1 Will. 4, c. 25, the casual revenues of the Crown including droits of admiralty and droits of the Crown were treated in the same way as the other hereditary revenues and carried during the life of King William IV. to the Consolidated Fund, it being provided that all such revenues should after his death be payable to his heirs and successors. Sect. 12 of that Act provides that nothing therein contained should impair or prejudice any rights or powers of control, management, or direction relative to (inter alia) the granting of any droits of admiralty or any droits of the Crown as a reward or remuneration to any officer or officers or other person or persons seizing or taking the same or giving any information relating thereto, it being the true intent and meaning of the Act that the said rights and powers should not in any degree be prejudiced in any manner, but only that the moneys accruing to the Crown after the full and free exercise and enjoyment of the said rights and powers should during His Majesty's life be carried to the Consolidated Fund. It was obviously the intention of this clause that the Crown's right of making grants out of droits of admiralty and droits of the Crown in favour of captors or persons giving information leading to the capture should be preserved, but, nothing being expressly said as to making grants in order to redress hardships, it is arguable that on the principle of expressio unius est exclusio alterius the Crown's right in this respect was intended to be taken away. Further, the same argument is open upon the construction of 1 & 2 Vict. c. 2, which in effect re-enacted the Act of 1 Will. 4, c. 25, during the reign of Queen Victoria. It is unnecessary actually to decide the point, and their Lordships will assume for the purpose of this case that during the reigns of King William IV. and Queen Victoria the right of the Crown in respect of admiralty droits and droits of the Crown was confined to rewarding captors and persons giving information leading to the capture. It seems clear, however, that on the death of Queen Victoria her successor, King Edward VII., became entitled to droits of admiralty and droits of the Crown to the same extent as if there had never been a surrender in favour of the Consolidated Fund. In other words, any restriction created during the lives of King William IV. and Queen Victoria ceased to apply. If, therefore, the ancient right of the Crown to

J. C. 1915 THE ODESSA. THE WOOLSTON.

dispose of these droits is now curtailed it must be by virtue of some statute passed subsequently to the death of Queen Victoria. In other words, it must be by virtue of the Civil List Acts 1 Edw. 7, c. 4, and 1 Geo. 5, c. 28.

By 1 Edw. 7, c. 4, s. 1, it is provided that the hereditary revenues which were by s. 2 of 1 & 2 Vict. c. 2 directed to be carried to and made part of the Consolidated Fund should during the life of King Edward VII. and six months afterwards be paid into the Exchequer and made part of the Consolidated Fund. By s. 9, sub-s. 2, it is provided that nothing in the Act contained should affect any rights or powers for the time being exercisable with respect to any of the hereditary revenues which were by the Act directed to be paid into the Exchequer, and by sub-s. 3 of the same section 1 & 2 Vict. c. 2 was with immaterial exceptions repealed. The Act of 1 Geo. 5, c. 28, re-enacts in the same terms the Act of 1 Edw. 7, c. 4, for the life of His present Majesty and six months afterwards.

The question, therefore, is as to the meaning and effect of the reservation contained in the two last-mentioned Acts of the rights and powers of the Crown for the time being exercisable. It should be noticed in contrast to the Acts of 1 Will. 4, c. 25, and 1 & 2 Vict. c. 2 that the reservation is not specific but general in its terms. It should be noticed also that it is not a reservation of rights and powers which were or might have been exercised by some former Sovereign or Sovereigns (the form of reservation in some of the earlier Civil List Acts), but a reservation of rights and powers "for the time being" exercisable. This must mean powers which have not at the date of their proposed exercise been taken away by Act of Parliament. To ascertain the nature of the rights and powers intended to be reserved it is permissible to consider the object for which the Acts themselves and the earlier Acts hereinbefore mentioned were passed.

The object of each of these Acts is a surrender by the Crown of its hereditary revenues in consideration of a fixed grant from Parliament. Each Act has been intended to carry to the Consolidated Fund revenue which would otherwise have gone to the Sovereign, and not revenue which because of the exercise of some right or power in the Crown would never have gone to the Sovereign at all. This

object was, in the Acts of George IV., William IV., and Victoria, sought to be attained by a specific enumeration of the rights reserved. In the Acts of Edward VII. and George V. it is sought to be attained by a general reservation of all rights. It could hardly be contended that the rights and powers expressly reserved in the earlier Acts are not included in the general reservation contained in the latter Acts. If such a contention were well founded the Crown would have lost many rights the existence of which is of great importance in the public interest. It would have lost, for instance, the right to make grants to the natural children of a bastard intestate or to reward captors or persons giving information leading to the capture of enemy goods. It is of equal importance in the public interest, and indeed of friendly relations with neutral Powers, that the Crown should retain the power of making in the interests either of British subjects or of neutrals such an Order in Council as was done at the outbreak of the Danish war in 1807. The only distinction is that no such power was expressly reserved in the earlier Civil List Acts. It is in their Lordships' opinion much more reasonable to suppose that the general words were used to cover such a case than to confine the words themselves, in spite of their generality, to rights and powers expressly reserved by the earlier Acts. If the words of reservation now in force are sufficient to cover a right of so important and useful a nature, it would, in their Lordships' opinion, be wrong to hold that it had been destroyed merely because it had ceased to be exercisable during the reigns of King William IV. and Queen Victoria. Their Lordships therefore hold that the power in question still exists. They desire, however, to state that they express no opinion as to whether the present case is one in which the power ought to be exercised.

There were two other points suggested in argument which deserve some consideration. First it was said that the difficulty of recognizing liens on captured enemy goods might be less in the case of a lienholder being a subject than in the case of his being a neutral. In the case of a neutral it is obvious that the payment of the lien out of the proceeds of a sale of the goods would enure directly to the benefit of the enemy. The enemy debt would thus be paid at the expense of the captors instead of the neutral being left to recover it in the enemy Courts. A right of capture at sea would thus be deprived

J. C. 1915 THE ODESSA; THE WOOLSTON.

of its national advantage. On the other hand, if the lienholder be a subject, his right of proceeding in the enemy Courts is, if not lost, at any rate suspended by the existence of a state of war. If the right be lost the recognition of the lien would not, it is said, enure to the advantage of the alien enemy, but merely to one of His Majesty's subjects. If the right be merely suspended it could not enure to the advantage of the alien enemy, at any rate until after the war, and the Court, it is said, should only consider the existing state of war and not be guided by what will happen when the war is over. There may be some force in these considerations, but, on the other hand, it is to be remembered that by international comity the Courts of Prize in this country have, in general, extended to neutrals the same advantages as they afford to His Majesty's subjects, and it would be difficult to make an exception. Moreover, both in the case of a neutral and of a subject the lienholder may have in his hands assets belonging to the enemy to which he can have recourse for the payment of his debt; and into such a matter the Courts have no means of inquiring.

The second suggestion does not involve the same difficulty. It is that the rules laid down in the cases referred to should be confined to transactions originating during the war, and that liens created bona fide before the war began might well be recognized whether held by subjects or neutrals. There is, however, no authority for such a distinction, indeed authority is the other way: see *The Tobago*. (1)

Neither of the above suggestions was seriously pressed on their Lordships, nor could either of them be accepted.

For the foregoing reasons their Lordships will humbly advise His Majesty that the appeal should be dismissed.

THE CARGO EX WOOLSTON.

The above judgment in the case of the cargo ex *Odessa* applies equally in the case of the cargo ex *Woolston*. The only difference between the two cases is that the *Odessa* was an enemy ship and the *Woolston* was a British ship. Their Lordships are of opinion that enemy goods on board British ships at the commencement of hostilities are the proper subject of maritime prize. The point has

(1) 5 C. Rob. 218.

been more fully dealt with in the judgment in *The Roumanian*. (1) The fact that the *Woolston* was a British ship can therefore have no importance unless it be necessary for the Court to act upon some presumption arising from the character of the ship. It is unnecessary to act on any such presumption where, as in the present case, the whole facts are in evidence and the enemy character of the cargo is fully established.

J. C. 1915 THE ODESSA. THE WOOLSTON.

In this case, also, their Lordships will humbly advise His Majesty that the appeal should be dismissed.

Solicitors for appellants: *Stibbard, Gibson & Co.*
Solicitor for respondent: *The Treasury Solicitor.*

[PRIVY COUNCIL.]

COPTHALL STORES, LIMITED . . . . . APPELLANTS;

AND

WILLOUGHBY'S CONSOLIDATED COMPANY, LIMITED . . . . . RESPONDENTS.

J. C.* 1915 *July* 26.

ON APPEAL FROM THE SUPREME COURT OF SOUTH AFRICA.

Roman-Dutch Law—Servitude—Right to trade upon Lands—Assignability—Purchaser with Notice.

In 1895 the then registered owners of land in Southern Rhodesia granted to a company the right to trade in certain parts of it. The company subsequently went into liquidation, and all its assets were bought by the appellants, who received possession of certain sites under the agreement and erected stores thereon. No servitude or incumbrance was registered in respect of the agreement. After mesne assignments the respondents became owners of the land with a clear registered title, and sued for a declaration that the appellants were not entitled to occupy any part of it, and for ejectment. The appellants pleaded that by virtue of the agreement they had an exclusive right to trade upon the land and to occupy such sites thereon as were necessary for that purpose, and that

* *Present:* VISCOUNT HALDANE, LORD DUNEDIN, LORD SHAW OF DUNFERMLINE, LORD PARKER OF WADDINGTON, and LORD SUMNER.

(1) Ante, p. 124.

J. C.

1915

COPTHALL STORES, LIMITED v. WILLOUGHBY'S CONSOLIDATED COMPANY, LIMITED.

the respondents purchased with notice and subject to their rights:—

Held, that the respondents were entitled to judgment upon the case as pleaded, but that the appellants should have conditional leave to amend their defence by pleading possession of specific sites under the agreement and the expenditure of money thereon, and that the respondents bought with notice of those facts.

Quaere whether according to the law in Southern Rhodesia the defence so amended would be an answer to the claim as to the specific sites referred to.

APPEAL by special leave from a judgment of the Supreme Court of South Africa, Appellate Division (May 21, 1913), so far as it reversed a judgment of the High Court of Southern Rhodesia (January 13, 1913).

By an agreement dated July 1, 1895, the Matabele Gold Reefs and Estates Company, Limited, the registered owners of certain land in Matabeleland, sold to Dawson's Stores, Limited, the goodwill of its trading and stores business there carried on "together with the right to trade" in certain parts of the land, including the farms the subject of the appeal. The consideration for the agreement was the allotment of shares in the purchasing company. Dawson's Stores, Limited, went into voluntary liquidation, and by an agreement dated May 26, 1900, the liquidator sold the company's assets to the appellants. Dawson's Stores, Limited, and the appellants had occupied various sites upon the farms and thereon had erected buildings, some of a substantial character, and had carried on trading operations. No incumbrance or servitude was registered against the land in respect of the agreement or the rights thereunder.

Subsequently, by successive deeds of transfer, duly registered, the land became vested in the Matabele Reefs and Estates Company, Limited, and that company charged its assets in favour of trustees for debenture-holders. A debenture-holders' action was commenced against the company in the Chancery Division in England and a receiver was appointed. By an agreement dated May 10, 1911, and sanctioned by the Court, the receiver sold the assets of the company, including the farms the subject of the appeal, to the respondents.

On November 28, 1911, in pursuance of this agreement, full

titles of ownership, free of incumbrances or reservations, were transferred by the company and the receiver to the respondents in Southern Rhodesia.

At the date of the agreement of May 10, 1911, the respondents had knowledge of the agreement of July 1. 1895, and that the appellants had been given possession of sites thereunder.

The respondents in 1912 commenced an action in the High Court of Southern Rhodesia claiming (1.) a declaration that the appellants were not entitled to occupy any portion of the respondents' land, (2.) ejectment, and (3.) mesne profits.

The appellants pleaded that, in virtue of the agreement of July 1, 1895, they were entitled to (1.) the exclusive right of trading on the properties therein mentioned, and (2.) to take and occupy thereon such sites as were necessary for the purpose of that trade. They further alleged that the respondents and their predecessors in title had taken with full knowledge of the appellants' rights and subject thereto.

The action was tried by Vintcent J., who held that the respondents bought with knowledge of the agreement of July 1, 1895, and were bound by its terms. He held that the agreement conferred on the appellants the rights which they claimed as to the farms the subject of the present appeal, but that they had not established any rights as to other farms.

Both parties appealed to the Supreme Court. That Court (Lord de Villiers C.J. with Solomon and Innes JJ.) dismissed the present appellants' appeal as to the farms last mentioned, but allowed the appeal of the present respondents, save that it was ordered that the judgment should not affect the goodwill of any trading or stores business established before July 1, 1895, nor the validity of leases granted by the appellants after that date with the consent or knowledge of the respondents' predecessors in title. The learned Chief Justice was of opinion that it was clearly established that a clean transfer of land coram lege loci, which was in the nature of a semi-judicial act, passed the dominion to the transferee, and that, except perhaps where a title by prescription appeared in the title deed, was conclusive in favour of a bona fide purchaser. The grant to Dawson's Stores, Limited, did not appear to him to be wide enough to include the powers claimed, and, even

J. C.
1915
COPTHALL STORES, LIMITED v. WILLOUGHBY'S CONSOLIDATED COMPANY, LIMITED.

if assignable, the rights claimed constituted an encroachment upon the respondents' rights, which could not be supported without registration. He held that the right claimed was not a praedial servitude but merely a personal servitude of a vague character, and that even if it had been a praedial servitude the appellants, who had knowledge of the proposed sale by the receiver, would have been debarred, seeing that they had not intervened upon the sale of the servient tenement by judicial decree.

Solomon J. and Innes J. delivered separate judgments allowing the appeal. Those learned judges held that, whatever the exact scope of the agreement of 1895, the rights under it were not assignable; further that the evidence did not establish that there had been any arrangement by the grantors to continue the rights to the appellants.

The proceedings in the Supreme Court are reported 1913 Sup. C. S. A. 267.

The appeal was originally argued before the Board on November 18 and 19, 1914, and was re-argued by their Lordships' order.

1915. June 28, 30; July 1, 7, 14. *Maugham, K.C.*, and *Luxmoore*, for the appellants. Upon the present appeal the appellants claim only in respect of those sites of which they have been given possession. A right to trade upon a defined plot of land is a good servitude and one which could be registered: Maasdorp's Institutes of Cape Law, bk. II., chaps. 20 and 21; *Colonial Government* v. *Brady*. (1) Even if the right was personal to Dawson's Stores, Limited, the evidence shows that it was recreated by the grantors in the appellants upon their incorporation. The respondents had notice not only of the agreement of 1895, but also of the specific sites handed over; they took subject to the appellants' rights in those sites. As between grantor and grantee servitudes can be created without registration, and as regards third parties notice has the same effect as registration: *Judd* v. *Fourie* (2); *Janson* v. *Fincham* (3); *Heidelberg Municipality* v. *Uys* (4); *Swart* v. *Trustee of Jeffreys Bay* (5); Voet, bk. 18, s. 6 (vi.); Maasdorp, ch. 25.

(1) (1900) 17 Sup. Ct. 404.
(2) (1881) 2 Buchanan, 41.
(3) (1892) 9 Juta, 289.
(4) (1898) 15 Sup. Ct. 156.
(5) (1889) 7 Juta, 110.

Steele v. *Thompson* (1) does not affect this proposition. [Wessels' History of Roman-Dutch Law, p. 506, as to history of registration in South Africa; Van Leeuwen's Commentaries (Kotze's translation), 1881, vol. i., p. 306, as to jus superficiarum, were also referred to.]

Upjohn, K.C., and *H. G. Robertson*, for the respondents. The case now put forward by the appellants differs from that pleaded and has not previously been advanced.

[They were stopped by their Lordships.]

July 26. The judgment of their Lordships was delivered by

LORD DUNEDIN. The plaintiffs (respondents) are owners of certain lands in Southern Rhodesia with clear registered title. The action is for (1.) a declaration that the defendants are not entitled to occupy, by themselves or their tenants, any portion of the plaintiffs' lands; (2.) ejectment from whatever portions of the plaintiffs' lands are presently in the occupation of the defendants or their tenants; and (3.) further relief which need not be mentioned.

The defendants originally based their defence on agreements of 1895 and 1910, but the case so far as based on the agreement of 1910 is now abandoned. The agreement of 1895 was made between a company called Dawson's Stores, the predecessors in title of the defendants, and the Matabele Company, the predecessors in title of the plaintiffs.

The defence as lodged amounted to what was substantially a counter-claim for a declaration that in virtue of the agreement of 1895, which it was alleged was duly transferred to the defendants and binding on the plaintiffs, the defendants are entitled to (1.) the exclusive right of trading over the whole properties belonging to the plaintiffs detailed in a schedule A annexed, and (2.) for purposes of the said trade to take and occupy in perpetuity such store sites as were necessary. It followed that, if sustained, head (2.) was a complete answer to the claim for ejectment. The defence in both its heads was maintained by the judge of first instance, but on appeal to the Supreme Court it was repelled and judgment pronounced as claimed by the plaintiffs.

(1) (1860) 13 Moo. P. C. 280.

J. C.
1915
COPTHALL STORES, LIMITED v. WILLOUGHBY'S CONSOLIDATED COMPANY, LIMITED.

Their Lordships have no doubt as to the soundness of the result at which the judges of the Supreme Court arrived on the case as pleaded before them.

Before their Lordships, however, the appellants made a complete change of front. Their counsel frankly abandoned all claim to what has above been described as a counter declaration, and pleaded only for maintenance in possession of the sites already occupied by themselves and their tenants in defence to eviction. The pleadings as they stand are not in a form properly to raise this defence. The argument which the learned counsel for the defence put forward was this. He said that in virtue of the agreement of 1895 the Matabele Company had handed over to Dawson's Stores certain store sites, that thereafter the defendant company, to whom the rights of Dawson's Stores had been transferred, occupied these sites and other sites, which in presence of the agreement they had selected, and that they had expended large sums of money in buildings upon these sites, and let them to tenants. He argued that according to the law of Rhodesia the agreement followed by possession constituted a real right of the nature of servitude. He further said that the plaintiffs, when they acquired the property of the Matabele Company, had notice of the existence of the agreement, and of the fact that the defendants were possessing these stores in virtue of it. And he argued that the result in law was that the plaintiff company was bound by the agreement, even though the agreement was admittedly not registered against the land. In support of this proposition he particularly relied on the judgment in *Judd* v. *Fourie*. (1) To found such an argument it is obvious that the pleadings ought to have specified the particular portions of land occupied, given particulars of the date of occupation, and set forth the expenditure of money upon them. Not only is all this not done, but from the form of the pleadings and the arguments in the Court below their Lordships have not had the assistance of the opinions of the learned judges in the Court below on the case as now wished to be raised. It is clear that the argument now put forward raises questions of law of great importance which would be apt to be applied to the cases of other holdings of a similar character, held by persons who are not parties to this case ; and in

(1) 2 Buchanan, p. 41.

particular it raises a very serious question of law as to the necessity of the registration of such rights, as to which it is apparent from the opinions in *Judd* v. *Fourie* (1) that there has not been unanimity among the learned judges in South Africa.

Their Lordships are, therefore, unwilling simply to dismiss the appeal without giving the appellants an opportunity of raising the true case. But the whole procedure, in which the appellants have been held to be wrong, is thrown away. The appellants must, therefore, pay the entire costs up to date, or the appeal will fall to be dismissed. If the costs as taxed are paid their Lordships will humbly advise His Majesty to recall the judgments appealed from hoc statu, and remit the case with a declaration that the defendants be allowed to amend their pleadings, and the plaintiffs to put in answers to such amendments. The learned judges will fix a proper time within which this must be done under sanction of the former judgment being repeated. If this is done there will fall to be made an alteration as to the date from which the rents and profits belong to the respondents, as the respondents' counsel admitted that the present date of January 1, 1911, could not be supported. They will also fix whether, upon the amended pleadings and answers, any further inquiry is necessary, and thereafter dispose of the case in such a manner as shall seem to them to be just.

It was agreed that the date from which the mesne profits were directed to run, namely, January 1, 1911, was incorrect. When the action is finally disposed of, this error must be corrected, either in the Supreme Court, or, if the appellants elect to proceed no further with the action, then they should be at liberty to apply to His Majesty in Council to put the matter right.

Their Lordships look upon the general questions as so important that they desire that the opinion of the whole members of the Court of Appeal be taken and their attention especially directed to the following questions :—

(1.) If an agreement by which the owner of land in Southern Rhodesia gives another person a right to trade over such land, and in pursuance of such trading to take and occupy suitable sites for stores, is followed by the taking and occupation of such sites

(1) 2 Buchanan, p. 41.

J. C. 1915

COPTHALL STORES, LIMITED v. WILLOUGHBY'S CONSOLIDATED COMPANY, LIMITED.

and by the expenditure of money thereon, is there constituted as between grantor and grantee a servitude which will enable the grantee to maintain possession of the sites as against the grantor ?

(2.) If the answer to question 1 is in the affirmative, is such servitude ipsa natura intransmissible, and, therefore, brought to an end by the death or extinction of the natural or legal person in whose favour it was constituted; or is the transmissibility a quality to be judged of according to the construction of the particular agreement and the whole circumstances of the case ?

(3.) How far is the transmissibility, if any, affected by registration or want of registration ?

(4.) If the servitude is valid, then, if it is not registered as against the servient tenement, is a purchaser of the servient tenement for valuable consideration, who has notice of the claim to the servitude at the time of purchase, bound to recognize it; and in particular is the opinion of Buchanan J. or of Sheppard J. in the case of *Judd* v. *Fourie* (1) to be preferred ?

(5.) What is the application of the law laid down in the answers to the foregoing queries to—(*a*) the agreement of 1895 in this case, (*b*) the notice as to the right which the plaintiffs are shown to have had ?

Solicitors for appellants: *Armitage, Chapple & Macnaghten.*
Solicitors for respondents: *Ashurst, Morris & Crisp.*

(1) 2 Buchanan, p. 41.

[PRIVY COUNCIL.]

A. K. A. S. JAMAL . . . . . APPELLANT;

AND

MOOLLA DAWOOD, SONS & CO. . . . . RESPONDENTS.

J. C.*
1915
Nov. 3.

ON APPEAL FROM THE CHIEF COURT OF LOWER BURMA.

Contract—Sale of Shares—Breach by Buyer—Measure of Damages—Rise in Value after Breach—Indian Contract Act (IX. of 1872), s. 73.

Under a contract for the sale of shares in a company the measure of damages upon a breach by the buyer is the difference between the contract price and the market price at the date of the breach, with an obligation on the part of the seller to mitigate the damages by getting the best price he can upon that date. If the seller retains the shares after the breach he cannot recover from the buyer any further loss if the market falls, nor is he liable to have the damages reduced if the market rises.

Sect. 73 of the Indian Contract Act, 1872, is merely declaratory of the common law as to damages.

APPEAL from a judgment and decree of the Chief Court of Lower Burma (July 24, 1913) affirming the judgment of Ormond J. of that Court.

By six contracts made between April and August, 1911, the respondents bought and the appellant sold, at various prices, 23,500 shares in the British Burma Petroleum Company, Limited, to be delivered and paid for on or before December 30, 1911. The contracts contained a clause providing that in default of payment the seller should have the option to resell the shares. The shares were tendered on December 30, 1911, but the respondents declined to take delivery or pay for them. At the market price for sales upon that day, namely 4*s.* 3*d.* a share, the 23,500 shares would have realized Rs.109,218 less than their price under the contracts. The appellant gave the respondents written notice of his intention to sell the shares against them. No sale, however, was made until February 28, 1912; all the shares were sold at various times between that date and August, 1912. By these sales the appellant realized more than if he had sold upon December 30,

* *Present:* VISCOUNT HALDANE, LORD WRENBURY, SIR JOHN EDGE, and MR. AMEER ALI.

J. C.
1915
JAMAL
v.
MOOLLA
DAWOOD,
SONS & CO.

1911, namely, a sum only Rs.79,862 less than the price under the contracts.

The facts are more fully stated in the judgment of their Lordships.

In March, 1912, the appellant sued the respondents in the Chief Court for damages for breach of contract, claiming Rs.109,218. The respondents contended that the appellant was only entitled to recover Rs.79,862.

The suit was tried by Ormond J., who gave judgment for the appellant for Rs.79,862 only on the ground that the appellant having elected to exercise the right of resale given under the contracts was bound to give the respondents the benefit of the prices obtained. The Chief Court in its appellate jurisdiction (Hartnoll, acting Chief Judge, and Young J.), while differing from the above view of Ormond J., affirmed his decision upon the ground that the respondents were entitled to the benefit of the prices actually obtained in mitigation of damages.

Oct. 22. *Sir Erle Richards, K.C.*, and *F. J. Coltman*, for the appellant. The case is governed by s. 73 of the Indian Contract Act (IX. of 1872), which, however, is merely declaratory of the English common law as to damages for breach of contract. The measure of damages is the difference in the market price of the shares at the date of the breach under the contract; the respondents are not entitled to the benefit of the higher prices obtained when the sales actually took place. Any increase or decrease in the price after the breach was a matter which only concerned the appellant. The decisions relied on by the Chief Court, such as *Brace* v. *Calder* (1), were cases with regard to contracts of a continuing character and are distinguishable. *Pott* v. *Flather* (2), which was referred to, is in the appellant's favour. The clause in the contracts giving the appellant an option to sell did not affect the appellant's right to damages, but merely provided a summary method of ascertaining the loss at the date of the breach. The sales were not in fact made in accordance with the clause. [*Williams Brothers* v. *Agius* (3) was also referred to.]

F. Dodd, for the respondents. A decision against the respondents

(1) [1895] 2 Q. B. 253. (2) (1847) 16 L. J. (Q.B.) 366.
(3) [1914] A. C. 510, at p. 520.

would infringe the cardinal rule as to damages for breach of contract, namely, that the plaintiff is entitled to the damages which he has suffered by reason of the breach: *Wertheim* v. *Chicoutimi Pulp Co.* (1) It was the duty of the appellant to mitigate the damages, and having by holding the shares obtained higher prices he cannot obtain damages on the basis of the price at the date of the breach. Further, the appellant had an option under the contracts to sell and elected to do so. The time at which the sales took place was suspended owing to negotiations, but they in fact were made under the appellant's notice and he is bound by them. The Indian Contract Act, 1872, does not refer expressly to the market price at the date of breach as the Sale of Goods Act, 1893, does.

Nov. 3. The judgment of their Lordships was delivered by

LORD WRENBURY. Under six contracts made at various dates between April and August, 1911, the plaintiff (the appellant) was seller to the defendants of certain 23,500 shares at prices amounting in the aggregate to Rs.184,125.10. The date for delivery was December 30, 1911. The contract notes contained a term providing that in the event of the buyer not making payment on the settlement day the seller should have the option of reselling the shares by auction, and any loss arising should be recoverable from the buyer. In some cases the words ran, "by auction at the Exchange at the next meeting."

By December 30 the shares had fallen largely in value. On that day the vendor tendered the shares and asked payment of the price, adding, "Failing compliance with this request by to-day our client will be forced to sell the said shares by public auction on or about the 2nd proximo, responsible for all losses sustained thereby." The purchasers did not pay the sum demanded. They set up a contention that the seller was indebted to them on another transaction, and they sent cheques for the differential sum of Rs.75,925.10, and called for a transfer of the shares. On January 2 1912, the seller repudiated the claim to a set-off, and repeated, "We have now to give you notice that our client intends to resell these shares and to institute a suit against you for the recovery of any loss which may result from that course." The purchasers

(1) [1911] A. C. 301, at p. 307.

J. C. 1915

JAMAL v. MOOLLA DAWOOD, SONS & CO.

stopped payment of the cheques, and nothing turns upon the fact that they were given.

Negotiations ensued between the parties which extended to February 26, 1912. On that day the seller, by his agents, wrote to the purchasers a letter as follows: "We are instructed by Mr. A. K. A. S. Jamal that he has not hitherto taken any steps to enforce his claim against you for failing to pay for and take delivery of 23,500 shares in the British Burma Petroleum Company, Limited, at your request, in order that his claim might, if possible, be settled. It now appears that no active steps are being taken to settle the matter but that much time is being lost. Our client will therefore now proceed to enforce his rights by suit unless the sum of Rs.1,09,219.6 is paid to him by way of compensation before the end of this week. The amount claimed is arrived at by deducting Rs.74,906.4, the value of 23,500 shares at 4*s.* 3*d.*, from Rs.1,84,125.10, the agreed price of the shares." The 4*s.* 3*d.* a share there mentioned was the market price of the shares on December 30.

On March 22 the seller commenced a suit to recover Rs.1,09,218.12 as damages for breach measured by the difference between the contract price of the shares and their market price (4*s.* 3*d.* a share) on the date of the breach, December 30, 1911. This is (with a trifling variance) the same sum and arrived at in the same way as the Rs.1,09,219.6 mentioned in the letter.

Immediately after the letter of February 26, 1912, namely, on February 28, the seller commenced to make sale of the shares. He sold them all at various dates from February 28 onwards. In one case the sale was at less than 4*s.* 3*d.* (namely, at 4*s.*). In one case it was at 4*s.* 3*d.* In every other case it was at a higher price.

The decision under appeal is one which gives the purchaser the benefit of the increased prices which the shares realized, by giving him credit in reduction of the damages for the increased prices in fact realized over the market price at December 30, the date of the breach. The appellant contends that this is wrong.

Their Lordships will first deal with the contractual term as to resale. Upon breach by the purchaser his contractual right to the shares fell to the ground. There arose a right to damages, and the stipulation in question was in their Lordships' opinion only a

stipulation that the seller might, if he thought fit, liquidate the damages by ascertaining the value of the shares at the date of the breach by an auction sale as specified. If the seller availed himself of that option he was not selling the purchaser's shares with a consequential obligation to account to him for the price, but was selling shares belonging to the seller which the purchaser ought to, but failed to, take up and pay for in order to ascertain what was the loss arising by reason of the purchaser not completing at the contract price. Their Lordships are unable to agree with the original judge that the plaintiff's letters of December 30 and January 2 amounted to an election to take a measure of damages to be arrived at by a resale. Moreover, there never was any sale by auction under the option. Nothing turns upon this provision as to resale.

The question therefore is the general question and may be stated thus : In a contract for sale of negotiable securities, is the measure of damages for breach the difference between the contract price and the market price at the date of the breach—with an obligation on the part of the seller to mitigate the damages by getting the best price he can at the date of the breach—or is the seller bound to reduce the damages, if he can, by subsequent sales at better prices ? If he is, and if the purchaser is entitled to the benefit of subsequent sales, it must also be true that he must bear the burden of subsequent losses. The latter proposition is in their Lordships' opinion impossible, and the former is equally unsound. If the seller retains the shares after the breach, the speculation as to the way the market will subsequently go is the speculation of the seller, not of the buyer ; the seller cannot recover from the buyer the loss below the market price at the date of the breach if the market falls, nor is he liable to the purchaser for the profit if the market rises.

It is undoubted law that a plaintiff who sues for damages owes the duty of taking all reasonable steps to mitigate the loss consequent upon the breach and cannot claim as damages any sum which is due to his own neglect. But the loss to be ascertained is the loss *at the date of the breach.* If at that date the plaintiff could do something or did something which mitigated the damage, the defendant is entitled to the benefit of it. *Staniforth* v. *Lyall* (1) is

(1) (1830) 7 Bing. 169.

J. C. 1915 JAMAL v. MOOLLA DAWOOD, SONS & CO.

an illustration of this. But the fact that by reason of the loss of the contract which the defendant has failed to perform the plaintiff obtains the benefit of another contract which is of value to him does not entitle the defendant to the benefit of the latter contract: *Yates* v. *Whyte* (1); *Bradburn* v. *Great Western Railway* (2); *Jebsen* v. *East and West India Dock Co.*(3)

The decision in *Rodocanachi* v. *Milburn* (4), that market value at the date of the breach is the decisive element, was upheld in the House of Lords in *Williams Brothers* v. *Agius*. (5) The breach in *Rodocanachi* v. *Milburn* (4) was a breach by the seller to deliver, but in their Lordships' opinion the proposition is equally true where the breach is committed by the buyer.

The respondents further contend that ss. 73 and 107 of the Indian Contract Act, or one of them, is in their favour. As regards s. 107 their Lordships are unable to see that it has any application in the present case. It deals with cases in which a seller has a lien on goods or has stopped them in transitu. The section follows upon sections dealing with those subject-matters. The present case is not one which falls under either of those heads. The seller was and remained the legal holder of the shares. As regards s. 73 it is but declaratory of the right to damages which has been discussed in the course of this judgment.

Their Lordships find that upon the appeal the officiating Chief Judge rested his judgment on a finding that the seller reduced his loss by selling the shares at a higher price than obtained at the date of the breach. This begs the question by assuming that loss means loss generally, not loss at the date of the breach. The seller's loss at the date of the breach was and remained the difference between contract price and market price at that date. When the buyer committed this breach the seller remained entitled to the shares, and became entitled to damages such as the law allows. The first of these two properties, namely, the shares, he kept for a time and subsequently sold them in a rising market. His pocket received benefit, but his loss at the date of the breach remained unaffected.

Their Lordships will humbly advise His Majesty that this appeal

(1) (1838) 4 Bing. N. C. 272.
(2) (1874) L. R. 10 Ex. 1.
(3) (1875) L. R. 10 C. P. 300.
(4) (1886) 18 Q. B. D. 67.
(5) [1914] A. C. 510.

ought to be allowed, and the orders in the original Court and in the Appeal Court discharged, and judgment entered for the plaintiff according to his plaint, and that the respondent ought to pay the costs in the Courts below and of this appeal.

J. C. 1915 JAMAL v. MOOLLA DAWOOD, SONS & Co.

Solicitors for appellant: *Arnould & Son.*
Solicitors for respondents: *Bramall & White.*

[PRIVY COUNCIL.]

BANK OF AUSTRALASIA AND OTHERS . . APPELLANTS;

AND

MUNICIPAL COUNCIL OF SYDNEY . . . RESPONDENTS.

J. C.* 1915 *Dec. 2.*

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

New South Wales—Street Improvements—Betterment Charge—Liability of Crown—Purchasers from Crown—Construction of Statute—Moore Street Improvement Act, 1890 (*N. S. W. 54 Vict. No.* 30), *ss.* 4, 5, *and* 6.

The Moore Street Improvement Act, 1890 (N. S. W. 54 Vict. No. 30), authorized the respondents to carry out certain street improvements in the city of Sydney. The Act provided that a fixed proportion of the cost should be raised by contributions (hereinafter called the betterment charge) assessed upon the owners of property within the improvement area liable to the city rate, and that the balance of the cost should be imposed upon the whole rateable property of the city. The charge in each case was spread over a period of one hundred years. By the Sydney Corporation Act, 1879 (N. S. W. 43 Vict. No. 3), ss. 3 and 103, the Crown, which was not named in the Act of 1890, was liable to pay the city rate on buildings but not on land which was not built upon. At the passing of the Act of 1890 the Crown owned within the improvement area, and was assessed upon, certain land on which there were no buildings. Subsequently the Crown divided the land into lots which it sold to the appellants respectively, and buildings were erected thereon:—

Held, that the Act of 1890 imposed no liability upon the Crown to contribute to the betterment charge in respect of the vacant land, and that the appellants did not become so liable by reason of their purchase of the lots, or the erection of buildings thereon.

APPEAL from a decree of the Supreme Court of New South Wales (August 12, 1914).

* *Present:* EARL LOREBURN, VISCOUNT HALDANE, and LORD WRENBURY.

J. C.
1915
BANK OF AUSTRAL-ASIA v. SYDNEY MUNICIPAL COUNCIL.

The Moore Street Improvement Act, 1890, authorized the respondents to carry out certain street improvements in the city of Sydney, and provided, in effect, that the cost of the improvements should be raised partly by a contribution from owners of property specified in the Act within the improvement area and partly by a special improvement rate to be imposed upon the whole rateable property in the city.

Sect. 4 provided that a notification should be made that " a plan showing the extent and position of the improvement area with which the owners of property liable to the city rate will be contributors to the special improvement rate hereinafter mentioned, together with a list of such owners," had been deposited with the town clerk ; and that the notification should (inter alia) give an estimate of the cost, the amounts and dates of making repayments, and the period (not to exceed one hundred years nor be less than fifty years) over which such repayments should be spread, and should state the " proportions . . . . in which the owners of property within the improvement area and the special street improvement rate shall defray such cost."

Sect. 5 provided : " the proportion in which the owners of property situated within the said improvement area shall . . . . contribute to the cost of such improvement . . . . shall not in any case be determined by the council at less than one-half of such cost, and the balance shall be a charge upon and be paid out of the special street improvement rate."

Sect. 6 provided for an assessment upon " every owner of property situate within the improvement area."

The Act did not contain any reference to the Crown, but under the Sydney Corporation Act, 1879, s. 103, in conjunction with the definition of " building " in s. 3 of that Act, the Crown was liable to pay city rates in respect of buildings which it owned or occupied, but not in respect of land not built upon.

Prior to the Moore Street Improvement Act, 1890, coming into operation the Crown had resumed possession of a block of land under the provisions of the General Post Office (Approaches Improvement) Act, 1889, which Act expressly provided for the sale of those portions of the resumed land which were not required for the improvement thereby authorized. Part of this land was within the improvement

area constituted by the Act of 1890, but at the date of the assessments of the contributions to the betterment charge thereunder there was no building upon it.

The respondents in 1891 assessed the amount of the contributions payable by owners of property within the improvement area, and purported to assess the Crown upon the above-mentioned land (block 38) at 5329*l.*, the annual payments provided by s. 4 of the Act being fixed at 217*l.* 9*s.* 4*d.* No appeal was made against this assessment, but no payments had been made in respect of it. Subsequently to 1891 the Crown divided block 38 into eleven lots, and at various dates between January, 1894, and September, 1907, sold and transferred the lots to the appellants, the Bank of Australasia, the University of Sydney, and the Mutual Life Insurance Company of New York. After these transfers buildings were erected upon the lots.

In 1913 the respondents instituted a suit in the Supreme Court of New South Wales (in Equity) against the appellants and a nominal defendant representing the Government of New South Wales claiming (1.) a declaration that the accrued payments in respect of the annual sum assessed against block 38 constituted a charge upon the whole block; (2.) a declaration that the appellants were liable to pay the annual sums falling due during the period of their respective occupations, and payment, and further relief.

The appellants denied their liability, and further contended that the suit was barred by the Real Estate (Limitation of Actions) Act (N. S. W. 8 Will. 4, No. 3, adopting 3 & 4 Will. 4, c. 27), and that in any case under s. 211 of the Sydney Corporation Act, 1902 (since repealed by the Sydney Corporation Act, 1905), the right to recover was limited to a period commencing from three years before the latter Act came into force. By consent the nominal defendant was discharged.

The suit was tried by Harvey J., who delivered judgment on August 12, 1914, holding that the Moore Street Improvement Act, 1890, was binding upon the Crown in respect of block 38 and that the respondents were entitled to recover from the appellants their respective contributions to the amount assessed upon block 38, such contributions to be from the times when the defendants became the owners of their respective holdings. The learned

J. C. 1915

BANK OF AUSTRAL-ASIA v. SYDNEY MUNICIPAL COUNCIL.

judge further held that the Statutes of Limitation relied upon by the appellants afforded no defence to the suit.

The proceedings are reported in 14 N. S. W. State Reports, 363.

Nov. 19 and 22. *Ryde, K.C.*, and *Micklethwait*, for the appellants. The Crown was neither named nor referred to in the statute of 1890 and is consequently not bound thereby. The learned judge erred in thinking that the Crown could be liable by implication. The "owners of property" referred to in ss. 5 and 6 of the Act are owners liable to the city rate mentioned in s. 4; but under the Sydney Corporation Act, 1879, s. 103, the Crown was only liable to the city rate upon buildings. The learned judge misapprehended the effect of the judgment in *Sydney Corporation* v. *Goodlet* (1); that case has no bearing upon the present question. The appellants as successors in title to the Crown are under no greater obligation under the Act than the Crown. Under the Act the contribution to be made by the various owners within the improvements area has to be assessed once and for all. The provisions of s. 5 are inconsistent with liability arising after the assessment in respect of property not liable when the assessment was made. Further, s. 7, which gives a right of appeal against the assessment, is only consistent with the view that the liability must arise and be imposed when the assessment referred to in s. 6 is made. The decision in *Municipal Council of Sydney* v. *Terry* (2) does not deal with the position where the property was not liable to contribute at the date of the assessment.

[The Board desired that the limitation question should stand over for subsequent argument if it should become necessary.]

Sir Robert Finlay, K.C., and *Austen-Cartmell*, for the respondents. Whether or not the Crown was liable in respect of the betterment charge the appellants became so liable upon purchasing their lots. It was not the intention of the Act that land not built upon at the date of the assessment should for ever be free from contributing to the betterment charge, although it might be built upon immediately after the assessment was made. The decisions in *Municipal Council of Sydney* v. *Terry* (2) and *Municipal Council*

(1) (1912) 12 N. S. W. State Reports, 355. (2) [1907] A. C. 308.

of Sydney v. *Fleay* (1) show that liability under the Act shifts with change of ownership. The assessment in the present case was duly made and was not appealed from, and under it the liability to pay arose either when the land passed into private ownership or was built upon. The words in s. 4 " the owners liable to the city rate " include all those who may from time to time become so liable.

Ryde, K.C., replied.

Dec. 2. The judgment of their Lordships was delivered by

LORD WRENBURY. By the Sydney Corporation Act, 1879 (43 Vict. No. 3), the assessment of lands, houses, &c., is provided for by s. 103, and " every building, whether such building be vested in the Crown or be in the occupation of the Crown or not, and all lands, whether occupied or not, within the said city shall be deemed to be rateable property." Buildings are defined in s. 3. The result is (and it is not disputed that it is) that the Crown is rateable in respect of buildings but is not rateable in respect of lands on which there are no buildings.

By the General Post Office (Approaches Improvement) Act, 1889 (53 Vict. No. 13), it was provided by s. 2 that certain lands (of which the land in question in this case forms part) should be resumed for the purposes of the Act and be vested in the Minister for Public Works on behalf of Her Majesty for an absolute estate in fee simple in possession. The purposes of the Act were the formation of a new street to improve the then present approaches to the General Post Office. By s. 5 it was provided that the Act should be an absolute statutory authority enabling the Minister for Public Works to enlarge and improve the thoroughfare, and that the lands resumed should be used for making a certain public street, and the residue of the lands might be sold subject to such terms, &c., as to buildings as the Governor might determine.

By the Moore Street Improvement Act, 1890 (54 Vict. No. 30), the Municipal Corporation of Sydney were by s. 3 authorized to purchase or resume lands for widening Moore Street, and the following sections contained provisions as to the manner in which the cost of the improvements was to be borne. Their effect shortly stated is

(1) [1911] A. C. 371.

J. C. 1915

BANK OF AUSTRAL-ASIA v. SYDNEY MUNICIPAL COUNCIL.

that the cost of the improvements is to be met in a proportion to be determined as provided by s. 5 from two sources, namely, first, a contribution to be made by the owners of property situate within the improvement area (which may be called a betterment charge); and, secondly, the balance is to be a charge upon and is to be paid out of what the Act calls the special street improvement rate. The facts that there are two sources and that the latter is to bear the balance after the former has been satisfied prove that the former is not what the Act calls the special street improvement rate.

The first question upon this appeal is whether the words "the owners of property situated within the said improvement area" in s. 5 of the Act of 1890 include the Crown, in the case where the Crown is the owner of lands upon which there are no buildings.

The only facts relative to this first question are that at the date when the improvement was carried out and the assessment was made under the provisions of the Act of 1890 the Crown was the owner of lands within the improvement area upon which there were no buildings.

Sect. 4 of the Act of 1890 provides that a notification shall be made that a plan "showing the extent and position of the improvement area within which the owners of property liable to the city rate will be contributors to the special improvement rate hereinafter mentioned, together with a list of the names of such owners," has been deposited. Under the Act of 1879 the Crown was not liable to the city rate in respect of the lands in question, for there were no buildings on them. The Crown was no doubt liable to the city rate in respect of lands on which there were buildings, and would therefore, under circumstances which were not these circumstances, have been within the words "owners of property liable to the city rate." But for these lands the Crown was not within those words. It follows that so far there is nothing to render the Crown liable in respect of the lands here in question.

Moreover, not only are there no words to render the Crown liable, but the language of s. 103 of the Act of 1879 shows that for these lands without buildings the Crown is not liable. That section makes the Crown liable when there are buildings, and the absence of similar words when there are no buildings shows plainly (as indeed is not disputed) that in the latter case the Crown is not liable.

The respondents, however, argue that the words of s. 4 of the Act of 1890 " owners of property liable to the city rate " are to be construed as meaning " owners of property being property which now is or may hereafter become liable to the city rate." Their Lordships can find no ground for this contention. This is not construing but adding to the Act. It is moreover in their view impossible having regard to ss. 5, 6, and 7 of that Act, of which something further will be said presently. They further argue that the words in s. 4 " owners of property liable to the city rate " are not repeated in s. 5, but are replaced by the words " owners of property situated within the said improvement area." The latter words, however, do not enlarge or control the previous definition of the class of persons who are to contribute, but are used only to state the proportion in which the class (whatever is its true definition) is to pay.

The respondents also argue that the " special improvement rate hereinafter mentioned " in the early part of s. 4 is the same as the " special street improvement rate " mentioned later in that section and in s. 5 and as the " street improvement rate " mentioned in s. 7 (ii.), which two latter expressions are by s. 4 of the Moore Street Improvement Act, 1892 (55 Vict. No. 13), to be replaced by the words " city fund." Their Lordships find this contention inadmissible. The context in which the expression " special improvement rate " is found is a context which deals with the first of two sources above mentioned in contrast with the second class. The one is the betterment charge, the other the rate which is to supply the balance after getting in the betterment charge.

So far their Lordships hold that when the assessment was made in 1891 the Crown was not liable in respect of No. 38, the plot in question, which was at that date land of which the Crown was owner on which there were no buildings.

But subsequently, in 1894, 1900, 1901, and 1907, the Crown sold to several purchasers portions of the land which were not wanted for the street and which they were by s. 5 (*b*) of the Act of 1889 authorized to sell. Buildings have since been erected on the lands. The respondents contend that, assuming that the Crown was not liable, there has arisen in the purchasers a liability under which their vendor, the Crown, did not lie. Their Lordships cannot accept this

J. C.
1915
BANK OF AUSTRAL-ASIA v. SYDNEY MUNICIPAL COUNCIL.

contention. It is inconsistent with ss. 5, 6, and 7 of the Act of 1890. The proportion mentioned in ss. 4 and 5 and the assessment in s. 6 must be a proportion and an assessment made once for all and according to the facts existing at that time. The appeal mentioned in s. 7 must be brought within the time there limited. There is nothing in the Act to justify proportion and assessments to be made from time to time according to altered circumstances.

In *Municipal Council of Sydney* v. *Terry* (1), *Municipal Council of Sydney* v. *Fleay* (2), and *Municipal Council of Sydney* v. *Goodlet* (3) the construction of the Act of 1879 and of the Act of 1890 has come in question. But those decisions throw no light upon the question now to be decided. If A. was liable at the time of assessment it was decided that B., a subsequent purchaser, became liable. That is not the question here. This question is whether, when A. (i.e., the Crown) was not liable, B., a subsequent purchaser, becomes liable. In their Lordships' opinion he does not.

It results that the questions as to the Statutes of Limitation which were raised below do not arise here.

Their Lordships will humbly advise His Majesty that this appeal should be allowed and the action dismissed with costs, including the costs of this appeal.

Solicitors for appellants : *Farrer & Co.*
Solicitors for respondents : *Light & Fulton.*

(1) [1907] A. C. 308.
(2) [1911] A. C. 371.
(3) 12 N. S. W. State Reports, 355.

7

[HOUSE OF LORDS.]

UNITED STATES STEEL PRODUCTS COMPANY . . . . . } APPELLANTS;

AND

GREAT WESTERN RAILWAY COMPANY . RESPONDENTS.

H. L. (E.)*
1915
July 13.

Railway — Carriage of Goods — Condition in Consignment Note — Construction—General Lien—Stoppage in transitu—Priority.

The vendors of goods, an American company, authorized their agents, on the arrival of the goods in England, to deliver the goods to a railway company for carriage to the buyers upon the terms of a consignment note which contained a condition that all goods delivered to the company would be received and held by them subject to a lien for money due to them for the carriage of and other charges upon such goods, and also to a general lien for any moneys due to them from the owners of such goods upon any account. The vendors' agents accordingly delivered the goods to the railway company for carriage to the buyers. The vendors had paid all freight and charges in respect of the carriage of the goods. While the goods were still in the possession of the railway company as carriers the vendors, being unpaid and having been informed that the buyers were insolvent, gave notice of stoppage in transitu to the railway company. The buyers, who had meanwhile become owners of the goods by indorsement and delivery of the bill of lading, were indebted to the railway company in the sum of 1170*l.* on a general account. The company claimed, under the condition in the consignment note, that they had a lien as against the vendors in respect of the 1170*l.* due from the buyers :—

Held, that the condition did not confer on the railway company a right to assert a general lien on the goods in respect of the debt of the buyers in priority to the vendors' right of stoppage in transitu.

Decision of the Court of Appeal [1914] 3 K. B. 567 reversed and decision of Pickford J. [1913] 3 K. B. 357 restored.

APPEAL from an order of the Court of Appeal (1) reversing a judgment of Pickford J. (2)

By a contract in writing dated December 29, 1910, the appellants agreed to sell to Tupper & Co., Limited, of Bilston, in Staffordshire,

* *Present :* LORD BUCKMASTER L.C., LORD ATKINSON, LORD PARKER OF WADDINGTON, LORD PARMOOR, and LORD WRENBURY.

(1) [1914] 3 K. B. 567. (2) [1913] 3 K. B. 357.

H. L. (E.) 1915

UNITED STATES STEEL PRODUCTS COMPANY v. GREAT WESTERN RAILWAY.

1500 tons of steel billets to be shipped in about equal monthly quantities during February, March, and April, 1911. The price was to be 4*l.* 12*s.* 9*d.* per ton, cost, insurance, and freight paid to buyers' works at Bilston, and payment was to be made by thirty days' draft from date of arrival at the works. In pursuance of this contract the appellants shipped about 5000 tons of billets from Philadelphia to Manchester by the steamship *Manchester Shipper*, belonging to the Manchester Liners, Limited, under a bill of lading dated February 28, 1911. The goods were to be delivered to the appellants unto order or assigns subject to the conditions, exceptions, and restrictions contained in the bill of lading and subject to the marginal clauses.

By clause 10 "Goods destined to ports or places other than ship's port of discharge are to be forwarded thence at the risk of their owners and shall be subject exclusively to the conditions of the carriers who may complete the contract."

The margin of the bill of lading contained the following directions :—

"Notify Tupper & Co., Bilston, Eng.

"Goods to be forwarded to Batmans Hill Wks. via Gt. Western Rly. Bilston Eng. from Manchester and the carrier is authorised by the owner to forward by a connecting carrier and upon such conditions as the latter may exact. The carrier shall pay all charge for forwarding, but shall not be liable for any loss of or damage to the goods occurring after delivery to the connecting carrier."

The freight on the goods to Tupper & Co.'s works at Bilston was prepaid by the appellants at Philadelphia.

The bill of lading was indorsed in blank by the appellants and forwarded by them from their London office to Tupper & Co. on March 10, 1911.

On the same day the Manchester Liners, Limited, entered into a written contract with the Manchester Ship Canal Company for the carriage of the goods from Manchester to Bilston. The contract contained the following clause :—"Receive and forward the undermentioned goods to be carried at the reduced through rate below the company's through or local rate, in consideration whereof I agree to relieve the Manchester Ship Canal Company and all other companies or persons over whose lines the goods may pass, or in whose posses-

sion the same may be during any portion of the transit, from all liability for loss, damage, misdelivery, delay, or detention (including detention of traders' trucks) except upon proof that such loss, damage, misdelivery, delay, or detention arose from wilful misconduct on the part of the company's servants. And I also agree to the conditions on the back of this note. This agreement shall be deemed to be separately made with all companies or persons, parties to any through rate under which the goods are carried.

"All charges to senders."

Condition 7 of the conditions on the back of the note provided as follows: "All goods delivered to the company will be received and held by them subject to a lien for money due to them for the carriage of and other charges upon such goods and also to a general lien for any other moneys due to them from the owners of such goods upon any account; and in case any such lien is not satisfied within a reasonable time from the date upon which the company first gave notice to the owners of the goods of the exercise of the same, the goods may be sold by the company by auction or otherwise and the proceeds of sale applied to the satisfaction of every such lien and expenses."

The goods arrived at Manchester on March 14 and were carried by the respondents to Bilston Station, where they arrived about March 18, 1911, and a small portion of the goods was delivered to Tupper & Co.

On March 24, 1911, at which time Tupper & Co. had become insolvent, the appellants, who had received no payment by bill or otherwise for any part of the goods, gave notice to the respondents that as unpaid vendors they claimed to stop the goods in transitu. The respondents replied that on receiving information of Tupper & Co.'s financial position they suspended delivery on March 22 and exercised their right of lien on the goods in respect of a debt of 1170*l.* due to them from Tupper & Co. on a general account, and they claimed to set up their lien in priority to the appellants' right of stoppage in transitu.

On April 20, 1911, the appellants commenced an action against the respondents for detinue and/or conversion of the goods. After the issue of the writ it was agreed that the appellants, in order to release the goods, should pay to the respondents the 1170*l.*, leaving

H. L. (E.) 1915

UNITED STATES STEEL PRODUCTS COMPANY v. GREAT WESTERN RAILWAY.

the question whether the respondents were entitled to hold the goods to be settled in the action.

Pickford J. held that the language of condition 7 of the consignment note ought to be read as merely extending the particular lien which the respondents would by law have had against the consignees into a general lien as against such consignees for all moneys due from them to the respondents, and he therefore gave judgment for the appellants.

The Court of Appeal (Lord Sumner, Kennedy L.J., and Bray J.) reversed this decision and held that the condition conferred a right on the respondents to hold the goods against the appellants in respect of the general balance due from Tupper & Co.

1915. June 7. *Sir R. Finlay, K.C.*, and *Schiller, K.C.*, for the appellants. The general lien of the respondents operates only as against the persons entitled to the delivery of the goods and for debts due from such persons, and does not affect the right of the appellants, who owed nothing to the respondents, as unpaid vendors to stop the goods in transitu. "Owners" in condition 7 of the consignment note means Tupper & Co., to whom the property in the goods had passed by indorsement and delivery of the bill of lading on March 10, 1911. The condition binds the goods as against Tupper & Co., but only to the extent of their interest. It was never intended by that condition to pledge one man's property for another man's debt. The general law is that the vendor by stopping the goods does not regain the property in them, but recovers the right to hold possession until payment of the price, and the right of stoppage is subject to the lien of the carrier for charges in respect of the carriage of the goods, but is not subject to any lien which the carrier may have against the consignee for a general balance of account: Carver's Carriage by Sea, 5th ed., p. 656, par. 507; *Oppenheim* v. *Russell* (1); *Wright* v. *Snell* (2); *Farrell* v. *Richmond and Danville R.R. Co.* (3); *Pennsylvania R.R. Co.* v. *American Oil Works*. (4) If it was intended to alter the general law much clearer

(1) (1802) 3 Bos. & P. 42.

(2) (1822) 5 B. & Ald. 350, at p. 355.

(3) (1889) 11 Am. St. Rep. 760, at p. 763 (102 N. C. 390).

(4) (1889) 12 Am. St. Rep. 885 (126 Pa. St. 485).

language should have been used. [They also referred to the Sale of Goods Act, 1893, ss. 44 to 46.]

Duke, *K.C.*, and *Macassey*, *K.C.* (with them *H. McCardie*), for the respondents. This contract, in the view of the respondents, is binding on both the consignors and the consignees, but at any rate it is binding on the consignors. This form of contract was intended to get over the difficulty of *Oppenheim* v. *Russell* (1) and to secure to the carrier that any general lien he might have against the consignee should not be defeated by the action of the consignor, and this was effected by obtaining the consent of the consignor to the operation of the lien. A consignor who has agreed that the carrier shall have a general lien for his ledger account against the consignee cannot set up his right as unpaid vendor to stop the goods in transitu against that lien, since that is by implication a derogation from his bargain. The consignor has obtained a reduced rate of carriage on the faith of the contract, and if he reserves to himself the right to change the possession of the goods by the assertion of his rights as unpaid vendor he renders the general lien illusory. Condition 7 constitutes a definition of the rights between the consignor and the railway company, and, the language being unambiguous, the Court will not inquire into the prudence or otherwise of the contracting parties.

Sir R. Finlay, *K.C.*, replied.

The House took time for consideration.

July 13. LORD BUCKMASTER L.C. My Lords, the appellants in this case, who are the United States Steel Products Company of Philadelphia, entered into a contract on December 29, 1910, with a firm of Tupper & Co., Limited, of Batmans Hill Works, Bilston, in the county of Stafford, for the sale to them of 1500 gross tons of steel billets. By the terms of the contract the goods were to be delivered to the purchasers at their works at Bilston at a price of 4*l.* 12*s.* 9*d.* net per ton, cost, insurance, and freight being paid by the vendors. Under this contract a consignment was made by the appellants in February, 1911, of about 499 tons, but before delivery was complete Messrs. Tupper & Co., Limited, became insolvent, and

(1) 3 Bos. & P. 42.

H. L. (E.) 1915

UNITED STATES STEEL PRODUCTS COMPANY v. GREAT WESTERN RAILWAY.

Lord Buckmaster L.C.

thereupon the appellants asserted their right as unpaid vendors to stop delivery and regain possession of the goods.

If the only rights to be considered were those between the appellants and Messrs. Tupper & Co., Limited, there would be no dispute but that the appellants were justified in what they did. The goods, however, were at the moment when the appellants' notice to stop their delivery was received in the custody of the Great Western Railway Company, who are the respondents to this appeal; and they claimed that, under circumstances to which I will more exactly refer, they were entitled to retain possession in order to satisfy a lien for moneys due to them from Messrs. Tupper & Co., Limited, not for the carriage of these particular goods, but on a general account. Such a lien could not be maintained against the vendors apart from contract, and the real question in this case is whether such a contract exists. Pickford J. has held that it does not, but his judgment was reversed by the Court of Appeal, from whom the present appeal is brought to this House.

In order to answer the question thus raised it becomes necessary to examine in some detail the history and circumstances of the case. The appellants were, as I have already stated, bound under the terms of their contract to provide carriage and pay the freight of the goods in question. They accordingly shipped them by the steamship *Manchester Shipper*, a vessel which formed part of a line of steamers owned by the Manchester Liners, Limited, known as the Philadelphia-Manchester Line. The bill of lading, which was dated February 28, 1911, was made to the appellants' order, and contained this clause: [His Lordship read the marginal clause set out in the statement.] At this date the appellants had full disposing power over the goods, and this condition was a condition to which they assented, and which bound any one accepting the bill. This is indeed stated by the last clause in the bill of lading, which is in these terms: "In accepting this bill of lading, the shipper, owner and consignee of the goods and the holder of the bill of lading agree to be bound by all its stipulations, exceptions and conditions, whether written or printed, as fully as if they were all signed by such shipper, owner, consignee and holder."

The bill of lading was indorsed by the appellants and despatched to Messrs. Tupper & Co., Limited, by post on March 10, 1911. On

this day, accordingly, the property in the goods passed to the purchasers. On the same day the shipping company, the Manchester Liners, Limited, in pursuance of the authority that they had received on the bill of lading, consigned the goods by the Manchester Ship Canal Company upon terms that are contained in a consignment note of that date. The document is important, and it is necessary that I should read its actual words. They are these: [His Lordship read the clause commencing "Receive and forward," &c., and also condition 7 on the back of the consignment note, and observed that it was upon the true construction of that condition that the whole dispute depended.]

The goods were, pursuant to this note, delivered to the Great Western Railway Company on March 22, they arrived at Bilston Station on March 24, and on the same day, as Messrs. Tupper & Co., Limited, had then suspended payment, the appellants directed the Manchester Liners, Limited, to stop delivery, a direction which was at once forwarded by telegraph from the Manchester Liners, Limited, to the Great Western Railway.

In answer to this request the Great Western Railway replied on March 25 that they had already exercised a lien upon the goods for money due from Messrs. Tupper & Co. to them. It is not necessary to pursue the further correspondence that took place between the parties. The railway company claimed that they were entitled as against the goods to payment of 1170*l.*, money owing on a general account apparently including a sum for costs of some legal proceedings, and to obtain the release of the goods this sum was paid to them by the appellants under an agreement which provided that, in the event of a decision that the respondents had not got a lien on the steel billets ranking in priority to the appellants' rights as unpaid vendors, the respondents should repay such sum of 1170*l.* to the appellants. The dispute was thus transferred from the goods to the money, and it is the claim to this sum that is the subject of this present appeal.

My Lords, before more closely examining the terms of the contract of March 10, under which the respondents claim, it is, I think, desirable to state how the law stands in relation to the rival claims of unpaid vendors and carriers of goods. Apart from any express contract, it is clear that a carrier of goods, whether by land or sea,

H. L. (E.)
1915
UNITED STATES STEEL PRODUCTS COMPANY v. GREAT WESTERN RAILWAY.
Lord Buckmaster L.C.

has a lien on the goods for their freight, but this right, which arises from the common law, is confined to the carrier's charges payable on the carriage of the particular goods. Such a lien prevails against the rights of the vendors as well as those of the consignees. On the other hand, a general lien, that is, a right to retain the goods for other freights due upon other transactions, can only arise by express contract or from general usage, and such a lien, apart from contract, cannot affect the right of the consignor. A claim to such a lien was considered in the case of *Wright* v. *Snell.* (1)

In that case goods were consigned by a manufacturer in Staffordshire to his agent in London for sale on commission in May and July, 1820. The carriers had at a date stated in the report to be between September, 1819, and February, 1821, delivered to the consignor a printed freight note stating "That all goods, from whomsoever received, would be subject to a lien, not only for the freight of the particular goods, but also for any general balance that may be due from the person to whom they are consigned or addressed." The report does not specify the exact date when this note was delivered, but the argument proceeded upon the footing that its terms were accepted as the terms of carriage.

In reliance on this provision the carriers refused delivery to the consignee until he had paid the sum of 58*l.* for the carriage of goods not belonging to the consignor. As in the present case, the goods were sold, the money was retained by the carriers, and the action was brought against them by the consignor for its recovery, and judgment was given in favour of the plaintiff.

The different position of the consignee in that case from the consignees in the present instance, and the different character of the contract, prevent the case being treated as a direct decision, but in the course of his judgment Best J. made a statement to which reference is useful. He said: "But even supposing these goods, instead of being addressed to a factor, had been addressed to the real purchaser, the carrier would have no right to say, if the bargain was rescinded, either from the inability of the purchaser to pay, or his refusal to complete the bargain, that the original owner of the goods should not have them back without paying all that might be due from the proposed vendee."

(1) 5 B. & Ald. 350.

Apart from special circumstances arising from contract or usage I see no reason to differ from this statement of the law, and, indeed, it was not challenged before your Lordships. But it is in relation to the law so stated that the meaning of condition 7 of the conditions indorsed upon the consignment note must be determined. Some discussion has taken place as to whether this consignment note bound Messrs. Tupper & Co., Limited, the consignees of the goods; and it appears that the judgment of Lord Sumner in the Court of Appeal rested, in part at least, upon the view that they could not be bound. Counsel before your Lordships, both for the appellants and the respondents, admitted that Messrs. Tupper & Co., Limited, were bound, but as they are not before this House, too great reliance should not be placed on this admission. They were certainly bound by the terms of the bill of lading which they accepted, and it would seem that the only means by which they could avoid the liabilities created by the consignment note would be by establishing that it was outside the powers which the bill of lading conferred upon the shipping company. In my opinion, however, it is not necessary that the consideration of this question should be undertaken by your Lordships. The consignment note was certainly designed to bind the consignees, for it is not, in my opinion, possible to assign any meaning to the words "owners of such goods," in clause 7, which would exclude them from the ambit of the phrase; in these circumstances interpretation of the document must be independent of the question whether, in fact, it bound the people whom it purported to affect. The efficacy and the meaning of a contract may be, and in this case are, different and independent questions, and the solution of the one is not assisted by the consideration of the other. Whether or not it bound Messrs. Tupper & Co., Limited, it certainly bound the vendors.

It is argued on behalf of the respondents that when once this is conceded it follows that the appellants (the vendors) intended not only to confer upon the carriers of the goods a general lien for all moneys due to the carriers from the consignees upon any account, but also, in order to make this lien effectual, that the right to stop the goods in transit should be postponed in its favour; and, in support of this contention, it is pointed out that the contract is one under which the vendors obtained reduced terms for the carriage

H. L. (E.)
1915
UNITED STATES STEEL PRODUCTS COMPANY v. GREAT WESTERN RAILWAY.
Lord Buckmaster L.C.

which they were liable to pay. This is no doubt true. But it does not make the language of the clause more plain, it only affords a reason why the vendors might have been induced to postpone their rights. It does not show that, in fact, they have been postponed.

My Lords, in my opinion, the clause means no more than its actual words imply, namely, that the carriers are to have, first, a particular lien for the special freight and charges applicable to the particular goods, and, secondly, a general lien that will cover all outstanding moneys. These two liens take their position according to the law; the first has priority over the right of stoppage in transit, the second has not.

It was argued that the fact that the first lien took precedence over the vendors' right showed that the second was intended to enjoy the same priority. Examination of the clause leads me to a contrary conclusion. The first lien was not stated to enjoy those rights, nor do they arise, by virtue of the contract, they attach to it by the character of the lien itself; in the same way the rights associated with the general lien are also undefined, and in the absence of express bargain to the contrary they rank subsequent to those of the vendors.

It was, indeed, contended on behalf of the respondents that such a bargain was to be found in the consignment note, since the contrary view would destroy the value of the general lien. I cannot accept this view. Without the provision as to the general lien the railway company could only have enjoyed a right against the consignees to retain the goods in respect of their general account by proof of a usage in the trade to that effect, while the contract gives them expressly rights of the widest character, which it might be difficult to support by any evidence of usage.

My Lords, these considerations would be sufficient to answer the case set up by the respondents, but another view appears to have been presented to the Court of Appeal by the appellants, with which I cannot agree. The argument there seems to have been that the phrase "owners of such goods" in clause 7 meant only the consignors, that consequently the general lien was only intended to cover moneys due from them, and since no such moneys were due, no lien existed. It must have been to this contention that Lord Sumner directed his observations when he said, "If you scratch out

'owners of such goods' and write in 'Tupper and Company,' cadit quaestio, and yet what other interpretation is to be put upon it?" That, in the circumstances of this case, Messrs. Tupper & Co., Limited, were included within the meaning of the phrase "the owners of such goods" seems to me plain, but they are not the only people who answer to the description. I entirely agree with Pickford J. that the phrase covers all persons who under the contract and the bill of lading were entitled to go to the railway company and receive the goods. But it does not follow from this that the general lien was a lien to be exercised as against any persons except such owners, or defeated rights that were paramount to theirs. The real question does not depend on ascertaining from whom the money is due, but as against whom the claim of retention in respect of such money can be asserted. For the reasons that I have already stated, it is my opinion that such right can only be asserted against the persons who both owe the money and claim the delivery, and if a person from whom no money is due is in a position to assert his right to the goods the general lien is inoperative.

My Lords, I think the judgment of the Court of Appeal should be reversed, and that of Pickford J. restored.

Lord Atkinson. My Lords, the question for decision in this case is the true construction of the seventh of the conditions printed on the back of a certain contract dated March 10, 1911, entered into between the Manchester Liners, Limited, and the Manchester Ship Canal Company for the carriage of certain steel billets from Manchester to Batmans Hill Works, Bilston. These Batmans Hill Works belonged to Messrs. Tupper & Co., who had purchased, on credit, these billets from the appellants on February 15, 1911. The purchasers had before the delivery of the goods stopped payment. The appellants, purporting to exercise their right as unpaid vendors to stop the goods in transitu, duly served notice on the respondents on March 24, 1911, requiring them to stop delivery to Tupper & Co. of the consignment or any part of it undelivered. In fact, only a small portion of the billets had been delivered. The respondents held possession of the balance. The freight for the goods had been prepaid. Nothing whatever remained due to the respondents in respect of the carriage of these goods to their destination, but a

H. L. (E.) 1915

UNITED STATES STEEL PRODUCTS COMPANY v. GREAT WESTERN RAILWAY.

Lord Atkinson.

sum of 1170*l.* was owed by Tupper & Co. to the respondents on a balance of account between them. The nature of the account or of the items composing it does not appear. The wording of the condition is wide enough to cover debts of any kind.

The respondents contend that by this condition, properly construed, the lien of the appellants as unpaid vendors for the price of the goods is postponed to a general lien for this sum of 1170*l.* purported to be given to them by the terms of this condition.

The appellants on the other hand contend that even if Messrs. Tupper & Co. are bound by this seventh condition, and have thereby, as owners, given to the respondents a general lien on the goods in respect of this sum of 1170*l.*, yet this condition does not, when properly construed, amount to an agreement binding upon the appellants to postpone their vendor's lien to this general lien.

The question for decision resolves itself, then, into this: which of these two constructions of the condition is its true construction? But before dealing with that question it is, I think, essential, owing to some of the observations of the learned Lords Justices in the Court of Appeal, to determine who, in the circumstances of the case, are bound by the provisions of this condition, whatever its precise meaning may be.

The goods were shipped by the vendors on board a steamship named the *Manchester Shipper*, belonging to the Manchester Liners, Limited, under a bill of lading dated February 28, 1911, signed by the latter company, according to which they were to be delivered at the port of Manchester to the order of that company or their assignees subject to the conditions, exceptions, and restrictions in the clauses (marginal and other) in the bill of lading contained. In many of these clauses the consignees are expressly named.

By the tenth clause it is provided "that goods destined to ports or places other than the ship's port of discharge are to be forwarded thence at the risk of their owners, and subject exclusively to the conditions of the carriers who may complete the transit." And by the last clause but one it is provided that "in accepting this bill of lading the shipper, owner and consignee of the goods and the holder of the bill of lading agree to be bound by all its stipulations, exceptions and conditions, whether written or printed, as fully as if they were all signed by such shipper, owner, consignee and holder."

By a clause printed in the margin of the bill of lading, it is provided that the goods are to be forwarded from Manchester to Batmans Hill Works, Bilston, via the Great Western Railway, and that "the carrier is authorised by the owner to forward by a connecting carrier, and upon such conditions as the latter may exact."

On March 10, four days before the arrival of the goods at Manchester, this bill of lading was admittedly indorsed in blank by the appellants and forwarded by post to Tupper & Co., who, from the moment of the receipt of the bill of lading, if not from the moment of its posting, became holders of it, and presumably owners of the goods.

By s. 1 of the Bills of Lading Act, 1855 (18 & 19 Vict. c. 111), it is provided that every consignee of goods named in a bill of lading, and every indorsee of a bill of lading to whom the property in the goods therein mentioned shall pass upon or by reason of such consignment or indorsement, shall have transferred to and vested in him all rights of suit, and be subject to the same liabilities in respect of such goods as if the contract contained in the bill of lading had been made with himself. By the 2nd section it is provided that nothing contained in the statute should prejudice or affect any right of stoppage in transit. Tupper & Co. accordingly became, by force of this statute and of the provision of this penultimate clause of the bill of lading itself, as much bound by every one of its provisions as if they had themselves signed it. Under its tenth paragraph they became bound to submit to any conditions the carrier, who completed the transit of the goods, might insist upon.

My Lords, on the same day, March 10, 1911, whether before or after the bill of lading had been indorsed does not appear, the connecting carriers (the respondents) made a contract with the Manchester Liners, Limited, for the carriage of these goods to their ultimate destination upon certain conditions. Condition 7 was one of these. One provision contained in it was to the effect that the respondents were to receive and hold the goods, subject to a general lien for any moneys (other than those due for the carriage of, or charges upon, the goods) due from the "owners" of the goods to them upon any account. This provision thus became one of the terms of a contract by which Tupper & Co. were as fully and

H. L. (E.) 1915

UNITED STATES STEEL PRODUCTS COMPANY v. GREAT WESTERN RAILWAY.

Lord Atkinson.

effectually bound as if they had themselves been executing parties to the contract of carriage of March 10, 1911.

If they were, as is contended, the "owners" of these goods within the meaning of the condition, then they contracted that the respondents should, altogether irrespective of the vendors' lien, have a general lien on the goods for such sum as they, Tupper & Co., should owe the respondents on any account. And if they were not the "owners" of the goods, within the meaning of the condition, they assented that the respondents should have that general lien for such sum as the persons who were the owners should owe the respondents on any account. Indeed, Mr. Duke, on behalf of the respondents, did not dispute this.

In my view it is a matter of importance, because it would appear to me, from some of the observations made in the Court of Appeal, that it was assumed that this provision of condition 7 would be futile and useless unless it had the effect of postponing the vendors' lien to the general lien claimed, inasmuch as Tupper & Co. were not bound by the condition, and did not, by their contract, create that general lien.

I am wholly unable to take that view. I think that if Tupper & Co. were the owners of the goods, they, being bound by this condition, gave a right to the respondents, very valuable while they continued owners, even if the lien of the vendors was not postponed, for this general lien and the vendors' lien would not be conterminous. The second is only called into existence in one event, namely, the bankruptcy or insolvency of the purchaser. In that event the enforcement of it might, no doubt, render the general lien, good in other respects, valueless or comparatively valueless; but in all other circumstances the general lien might afford most effective and valuable security to the creditor to whom it was given.

In my view there is nothing illogical or inconsistent in holding, as I think Pickford J. held, that while by the terms of this condition Messrs. Tupper & Co., as owners, clearly contracted to give to the respondents a general lien for all sums due by them, yet the language of the condition is not so clear and unequivocal as to bind the appellants to postpone to this general lien their own lien as unpaid vendors.

My Lords, there is no controversy as to the nature, extent, and

operation of a vendor's lien either at common law or by statute. The vendor's right to stop in transitu means not only the right to countermand delivery to the vendee but to order delivery to the vendor. It is subject to the possessory lien of the carrier for the charges due in respect of the carriage of the goods, but is not subject to any general lien which the carrier might have, as against the consignee of the goods, in respect of freight due on other goods: *Oppenheim* v. *Russell.* (1) The vendor by stopping the goods in transitu does not thereby regain the property in them, nor does he thereby cancel the sale. In no proper sense of the word does he, by the stoppage, become the " owner " of the goods.

It is the indebtedness of the " owners " for which a general lien is given. Yet if the goods had been sold during transit, and before notice given, to a bona fide holder to whom the bill of lading had been indorsed, or the document of title mentioned in the 47th section of the Sale of Goods Act, 1893, transferred, he would unquestionably be the " owner " of the goods and yet might owe nothing to the respondents.

Again, it was, as I understand, admitted by Mr. Duke that the vendors' lien was not lost but merely postponed to the general lien of the respondents. If that be so it would follow that, Tupper & Co. remaining the owners, the vendors upon payment of this sum of 1170*l.* would be entitled to the possession of the goods, though they were not " owners," and did not as " owners " owe the respondents anything, and yet it was only the liability of the " owners " which was secured.

The first three lines of the condition, which merely embody the existing rule of law, do not raise this difficulty, as the word " owners " is not found in them. Under them whoever was entitled to demand possession of the goods would be bound to pay for the carriage of the goods and the other charges mentioned, no matter from whom those moneys might be due.

The second clause of the condition is most ambiguous. In the construction of it the word " owners " cannot receive its ordinary meaning. At law the vendor's lien would clearly take precedence of the general lien, however valid. It is not shown that the vendors knew of the existence, nature, or extent of

(1) 3 Bos. & P. 42.

H. L. (E.) 1915

UNITED STATES STEEL PRODUCTS COMPANY v. GREAT WESTERN RAILWAY.

Lord Atkinson.

the indebtedness covered by it. That indebtedness might have arisen from transactions unconnected with any goods or their transit. It might have exceeded, as in fact it did exceed, in this case, the price of the goods carried.

It is, I think, necessary, before one decides that the vendors have postponed their lien, and thus practically given up in toto all the benefits of their legal right, to find in these conditions a clear agreement, express or implied, upon their part so to do. Their mere assent to the creation of a general lien by Tupper & Co. would not suffice, nor would, I think, even a mere contract by them that Tupper & Co. should, as owners, give the lien.

The only consideration received by the vendors to induce them to take a course so contrary to their interest, and apparently so reckless, was this, that the goods were to be forwarded at the lower rate, which rate they had to pay; but the general lien which the respondents got, whether it ranked behind or in front of the lien of the vendors, might well have been in itself a sufficient inducement to them to carry the goods at the lower rate.

My Lords, in my opinion there is not to be found in this condition any clear and definite agreement, express or implied, binding on the appellants to postpone their lien, as unpaid vendors, to the general lien thereby purported to be given by Tupper & Co., as owners, to the respondents. If that be so, then upon the authorities their lien ranks in front of the latter lien, and the appellants were entitled to obtain the possession of these goods without paying the sum of 1170*l.*

I think, therefore, that the decision appealed from was erroneous and should be reversed; that the decision of Pickford J., as he then was, was right, and should be restored, and this appeal be allowed with costs.

LORD PARKER OF WADDINGTON. (1) My Lords, on December 29, 1910, the appellants agreed to sell to Messrs. Tupper & Co., Limited, 1500 tons of steel billets to be delivered, c.i.f., to buyers' works, Bilston, England. The goods were to be shipped by about equal monthly quantities in February, March, and April, 1911, and each delivery was to be treated as a separate contract. Pursuant to this agreement, the appellants, on February 28, 1911, shipped a parcel

(1) Read by Lord Parmoor.

of steel billets on board the steamship *Manchester Shipper*, taking therefor a bill of lading to their order or assigns, according to which, though the port of discharge was Manchester, goods destined to places other than Manchester were to be forwarded thence at the risk of their owners, and subject exclusively to the conditions of the carriers who might complete the transit. There was a marginal note to the effect that the goods were to be forwarded via Great Western Railway from Manchester to the works of Messrs. Tupper & Co., Limited, at Bilston, upon such conditions as the connecting carrier might exact. Accordingly on March 10, 1911, the owners of the steamship *Manchester Shipper*, pursuant to the authority conferred on them by the bill of lading, entered into a contract with the Manchester Ship Canal Company to forward the goods to Messrs. Tupper & Co., Limited, at Bilston, at the reduced through rate therein mentioned. The contract provided that it should be deemed to have been entered into separately with all companies or persons parties to the through rate. The Great Western Railway Company was such a party, and the contract, therefore, may be considered to have been entered into with them. It provided, clause 7, that all goods delivered to the company, that is, for the purposes of this case, the Great Western Railway Company, should be received and held subject to a lien for money due to them for the carriage of and other charges upon such goods, and also to a general lien for any other moneys due to them from the " owners " of such goods upon any account, and, further, that in case any such lien were not satisfied within a reasonable time from the date upon which the company first gave notice to the owners of the goods of the exercise of the same, the goods might be sold by the company by auction or otherwise, and the proceeds of sale applied to the satisfaction of every such lien and expenses. The question your Lordships have to decide depends primarily upon the construction of this clause, for it has not been contended that the contract was outside the authority conferred by the bill of lading, or that any one claiming a title to the goods under the bill of lading was not bound by the authority so given, at any rate unless and until it had been rescinded. Indeed the bill of lading contains an express provision to that effect.

My Lords, on the same day on which the contract of carriage was

H. L. (E.) 1915

UNITED STATES STEEL PRODUCTS COMPANY v. GREAT WESTERN RAILWAY.

Lord Parker of Waddington.

entered into the bill of lading, indorsed in blank, was forwarded by the appellants' London house to Messrs. Tupper & Co., Limited. It was assumed in argument that, under these circumstances, the property in the goods was in Messrs. Tupper & Co., Limited, at the date of the contract of carriage. I will adopt this assumption, though I do not think it is necessarily correct. Clearly, however, the appellants, as unpaid vendors, had the right to stop the goods in transit for the purpose of asserting their lien for unpaid purchase-money. It is admitted that as between the appellants and Messrs. Tupper & Co., Limited, this right of stoppage has been duly exercised, so that the vendors' lien prevails; but it is contended on behalf of the respondents that such lien is by virtue of the contract of carriage postponed to the lien thereby created in favour of the Great Western Railway Company for certain moneys due to them from Messrs. Tupper & Co., Limited, on general account. It is not disputed that the lien of the Great Western Railway Company for money due to them for the carriage of and other charges upon the goods in question would take precedence, apart from any agreement, over any vendor's lien, but all these moneys were prepaid by the appellants. It seems, however, reasonably clear that a carrier cannot claim any general lien upon goods which he carries unless such lien be created by express agreement. It is equally clear that no such express agreement between carrier and consignee will oust the right of the consignor to stop the goods in transit for the purpose of asserting his lien for unpaid purchase-money. To oust this right there must be an express agreement by the consignor. The respondents' counsel in their argument accordingly relied on the seventh clause of the contract of carriage, first as an agreement on the part of Messrs. Tupper & Co., Limited, creating the lien in question for moneys due from them as the owners of the goods, and secondly as an agreement on the part of the appellants postponing their vendors' lien to the lien so created. It was assumed in argument on both sides that the agreement, according to its true construction, operated in the manner first suggested by the respondents' counsel. The dispute was whether it also operated in manner secondly suggested. The Court of Appeal, on the other hand, were of opinion that Messrs. Tupper & Co., Limited, were not parties to or bound by the agreement at all, and therefore that the clause creating the lien of the Great Western Railway

Company, if any effect be given to it, must operate simply upon the interest of the appellants as unpaid vendors, and preclude them from setting up their vendors' lien as against the lien thereby expressed to be created in favour of the Great Western Railway Company.

My Lords, it does not seem to me to be very material whether Messrs. Tupper & Co., Limited, be considered a party to the agreement or otherwise. As indorsees of the bill of lading they were, both by general law and by the terms of the bill itself, bound by its provisions, and could not claim the goods thereunder without giving effect to any lien created under the authority thereby conferred. I am of opinion, therefore, that the Great Western Railway Company could by virtue of the agreement have lawfully refused to deliver the goods to Messrs. Tupper & Co., Limited, until they had paid the amount due from them to the railway company on general account. It might, of course, be contended, on the one hand, that the creation of this lien prevented the vendors from fulfilling their contract for delivery at the Bilston Works, and, on the other hand, that the acceptance of the indorsed bill precluded the purchasers from raising this point, but your Lordships are not in the present appeal concerned with either contention. It is enough to say that, by virtue of the contract of carriage, Messrs. Tupper & Co., Limited, could not demand delivery of the goods by the Great Western Railway Company, except on the terms of satisfying the lien thereby created.

My Lords, it was assumed by the Court of Appeal that the word "owners" in clause 7 of the contract of carriage referred to the persons who at the date of the contract were the legal owners of the goods. I have the gravest doubts whether the contract can be so interpreted. The contract is a common form contract for use in cases in which the consignor desires to secure what has been called a preferential rate in lieu of the rates ordinarily chargeable for carriage by the companies concerned, and under these circumstances I think that the expression "owners" in the clause may well be used to denote the person entitled to the delivery of the goods, whoever such person may be, and does not necessarily refer to the person who at the date of the contract or at any other time may have the legal property in the goods. These common form contracts are intended to meet a variety of cases, and it is highly improbable that

H. L. (E.) 1915

UNITED STATES STEEL PRODUCTS COMPANY v. GREAT WESTERN RAILWAY.

Lord Parker of Waddington.

their effect was intended to be quite different according to whether the legal ownership, as to which the carriers did not necessarily know anything, was in one person or another. The goods carried might, for all the carrier could tell, be the property of consignor, consignee, or some third party, and the property might shift during the transit. Thus in the present case Messrs. Tupper & Co., Limited, might at the date of the contract have resold the goods and passed the property to a sub-purchaser. Again, but for the indorsement of the bill of lading, the property in the goods in question would have remained in the appellants, and according to the respondents' contention no one could have obtained delivery without satisfying all money due from the appellants to the Great Western Railway Company. Or again, the appellants might have indorsed the bill of lading in favour of a third party for re-indorsement and delivery to Messrs. Tupper & Co., Limited, in exchange for a draft in payment of the purchase price, in which case the agreement might create a lien for moneys due from the third party. These difficulties would not be met by construing " owners " as the owner for the time being, for non constat that the person entitled to delivery would be the owner. On the other hand, all difficulty is avoided by treating the word " owners " as meaning the persons entitled to demand delivery, whoever they may be, when the time for delivery comes, and this construction seems to be borne out by the fact that the company cannot sell to satisfy their lien without notice to the owners. If " owners " means the person demanding delivery, this provision raises no difficulty, but if it means the person having the legal property, as opposed to the person demanding delivery, all sorts of difficulties might arise in enforcing the lien.

My Lords, if, as I think, this be the true construction of the contract of carriage, the " owners " were in the events that have happened the appellants. They were entitled to demand delivery by virtue of the stoppage in transit. They can only get such delivery on payment of what is due from them to the carriers on general account, as well as the charges in respect of the goods themselves. But there is no question of their having to pay anything due to the respondents from Messrs. Tupper & Co., Limited, who ceased to be entitled to delivery as soon as the right of stoppage was exercised. If, however, I am wrong in this construction, I still think

that the appeal ought to succeed. There is, in my opinion, great difficulty in giving to clause 7 the double-edged effect for which the respondents contend. Had the parties to the contract intended that clause 7 should not only create a lien for moneys due from Messrs. Tupper & Co., Limited, as the actual owners, but should give such lien priority over the right of the appellants as unpaid vendors, the contract would, in my opinion, have contained an express provision to that effect. Had the carriers insisted on any such express provision it is difficult to believe that the appellants would have been willing, for the sake of the preferential rate, to accept the risk which such a clause would involve. The debt from the owners in respect of which the lien was created might have far exceeded the value of the consignment.

For the above reasons, I have come to the conclusion that the judgment of Pickford J. was right and ought to be restored.

Lord Parmoor. My Lords, the appellants, by a contract of December 29, 1910, agreed to sell to Tupper & Co., carrying on business at Bilston, 1500 tons of steel billets. In February, 1911, the appellants despatched to Tupper & Co. approximately 500 tons of steel billets. The goods were shipped with the Manchester Liners, Limited, who were further authorized by the appellants to forward the goods from the port of destination, Manchester, to the works of Tupper & Co. at Bilston. On March 10, 1911, the Manchester Liners, Limited, contracted with the Manchester Ship Canal Company for the forwarding of the goods over the Great Western Railway system to Bilston. On the same day the appellants forwarded to Tupper & Co. the shipping documents and the bills of lading indorsed in blank. These bills of lading were duly received by Tupper & Co., and thereupon the property in the goods passed to them.

The goods arrived at Manchester on March 14, 1911, and were duly forwarded by the respondents, arriving at or near Bilston about March 18. A portion of the goods was delivered to Tupper & Co., but on March 22 the respondents stopped delivery, and claimed to hold the balance in their possession under a general lien for money due to them from Messrs. Tupper & Co., amounting to 1170*l*. The appellants had received no payment for any part of the goods, and

H. L. (E.) 1915

UNITED STATES STEEL PRODUCTS COMPANY v. GREAT WESTERN RAILWAY.

Lord Parmoor.

on March 24, 1911, they, as unpaid vendors, gave notice to the respondents to stop delivery of the goods, or any portion thereof undelivered. It is not disputed that the respondents were entitled to hold the goods under a lien for freight as against the appellants, but the respondents claimed further that they were entitled under the contract of carriage to hold the goods as against the appellants under a general lien until they received payment of the general balance of 1170*l.* due to them from the consignees, Messrs. Tupper & Co.

Whether the respondents were so entitled or not depends entirely on the conditions on which they held the goods under the contract of carriage, and the question is one of construction.

The contract is in a form very generally adopted when goods are carried from station to station at owner's risk under special conditions. There are a number of these conditions on the back of the consignment note which are binding upon, and affect, any party in respect of the receiving, forwarding, or delivery of the goods, if they are reasonable, and signed by such party, or by the person delivering the goods for carriage. There was an option of sending the goods by the ordinary rate, the respondents accepting the ordinary liability, and it is not suggested that the conditions are unreasonable. Contracts at owner's risk have been extensively adopted, to the benefit and convenience both of the traders and the railway companies. The person delivering the goods for carriage, and who signed the contract, was R. J. Darlington, for Manchester Liners, Limited, who were agents of the appellants.

The contract, therefore, is binding upon the appellants and all other parties in a position to make any claim on the respondents in respect of the receiving, forwarding, and delivery of the goods. Condition 7 is as follows : [His Lordship read the condition.]

My Lords, there is often a difficulty in contracts of carriage to distinguish between the respective rights of the consignors or consignees. To meet this the appellants as senders of the goods are made liable in the first instance to pay the moneys due to the respondents for the carriage of the goods. It is a condition in the contract that where the charges of the carrier are not prepaid the goods are accepted for carriage only upon the condition that the sender remains liable for payment of the amount due to the carrier

for the carriage of such goods, without prejudice to the company's rights, if any, against the consignee or any other person. It is only necessary to add that the words consignor and consignee are found in the conditions, but that the general lien attaches, not in respect of moneys due to the respondents from the consignor or consignee, but from the owners of the goods.

Apart from any obligation created by the contract, the respondents would have the right to hold the goods for money due to them on their carriage, as against unpaid vendors who have exercised their right to stop delivery. It is not necessary to consider whether any greater right of lien is given in this respect under the contract than would arise from the common law obligation, since the moneys due to the respondents for the carriage of and other charges upon the goods have been paid. In substance, there is no need to insert this term in the contract to meet the case of a claim to possession of the goods by an unpaid vendor, and I doubt whether the contract was framed with reference to the rights of an unpaid vendor. On the other hand, it has long been established that the respondents have no common law right to hold the goods against an unpaid vendor, who has stopped delivery, under a general lien for any other moneys due to them on any account from the owners of the goods. If such a right exists in the present case it must be imposed by the contract. It was pointed out in an early case (*Rushforth* v. *Hadfield* (1)) that if it is not convenient for the consignee to pay for the carriage of specific goods at the time of delivery, it is easy for the carriers to stipulate that they shall have a lien for their balance upon other goods which they may thereafter carry for him. A general lien of this character has been extensively introduced in contracts of carriage, in order to protect carriers in respect of moneys due to them on ledger accounts. These contracts have been found to be convenient as a matter of business and of advantage both to the carrier and the trader, and in the present case the respondents have a general lien for moneys due to them from the owners of the goods on any account.

The expression "the owners of such goods" under the terms of the contract means the persons for the time being entitled to demand and demanding actual possession of the goods by delivery from the

(1) (1806) 7 East, 224.

H. L. (E.)
1915
UNITED STATES STEEL PRODUCTS COMPANY v. GREAT WESTERN RAILWAY.
Lord Parmoor.

carriers. I agree in this respect with the judgment of Pickford J. Bray J. in his judgment in the Court of Appeal says: "I do not think it means the owners for the time being; I think it means the owners of the goods at the time this contract was made." I am unable to agree in this construction, but assume, although the matter is not quite free from doubt, that the owners at that date were the consignees, Messrs. Tupper & Co. It is clear that when the goods first reached the destination to which they were consigned, and delivery of a portion thereof was made, the persons entitled to actual possession by delivery from the carriers were the consignees, Messrs. Tupper & Co.; and that a sum of 1170*l.* was due from them to the respondents on general account.

I do not doubt that as against Messrs. Tupper & Co. the respondents were entitled to a right of general lien for the sum of 1170*l.* Before, however, the delivery was completed the respondents, having reason to doubt the solvency of Messrs. Tupper & Co., stopped further delivery. The appellants subsequently, on March 24, gave notice to the respondents to "stop delivery billets Tupper and Company pending instructions," a notice effective in reference to the portion of the goods still in the possession of the carriers, and of which delivery had not been made. So soon as this notice had been given the respondents became liable to redeliver the portion of the goods not actually delivered to the appellants, or according to their directions. It is not suggested that there were any moneys due to the respondents from the appellants on any general account, but if such moneys had been due, the respondents would have had a general lien upon the goods to the amount of such moneys, and could have refused to deliver the goods to the appellants, or according to their directions, until such moneys had been paid. In other words, the carriers would have the protection for which they bargained, a right to hold the goods subject to a general lien for moneys due to them on any account from the person rightly claiming to take or direct delivery.

It makes no difference that on the arrival of the goods at their destination Messrs. Tupper & Co. had a right to claim delivery and received actual possession of a portion of the goods. The effect of the notice of stoppage in transitu has the same operation against the portion of the goods undelivered as it would have had against

the whole parcel if none had been delivered, and in respect of that portion the appellants became entitled to demand or to direct possession. It is said that on this construction the main object of the contract would be defeated, and the carrier deprived of his right to a general lien in respect of a ledger account due to him from a consignee. I do not think that this is the main object of the contract. In my opinion the words " owners of such goods " have been carefully selected, and the condition is not intended to give the respondents a right to retain goods against a person rightly claiming possession for moneys due to them on general account from some other person. In any event, the only question before your Lordships is one of construction, and, subject to the provisions of the Railway and Canal Traffic Acts, it is open to the contracting parties to make any contract which will best meet the varying business contingencies.

My Lords, in my opinion the appeal succeeds and the judgment of the Court below should be restored.

LORD WRENBURY. My Lords, the question for decision is limited to the construction of a single clause—nay, more, to the meaning of a single word in the clause. The clause is condition No. 7 in the contract of carriage of March 10, 1911 ; the word is " owners." It is not disputed that while the right of the unpaid vendor to stop in transitu is subject to the particular lien of the carrier for charges for carriage, it overrides any general lien of the carrier in the absence of special contract to the contrary. The whole question is whether between the consignors—the unpaid vendors—and the Great Western Company, the carriers, there existed a special contract to the contrary. Condition No. 7 is by the words on the face of the contract note of March 10, 1911, rendered binding upon the parties to that note. The parties are the Manchester Liners, Limited, and the Manchester Ship Canal Company. The contract, however, binds the United States Company, the consignors, as having been made on their behalf under the authority given by the bill of lading of February 28, 1911, and binds the Great Western Railway Company as a party to the through rate by virtue of the words to that effect in the contract of carriage. It is said that it binds the consignee also by virtue of the concluding words of the bill of lading.

H. L. (E.) 1915

UNITED STATES STEEL PRODUCTS COMPANY v. GREAT WESTERN RAILWAY.

Lord Wrenbury.

I do not doubt that it does, but it is, I think, immaterial whether it does or not.

Condition 7, then, is part of a valid contract, binding at any rate the two parties to this appeal. The only question is, What does it mean? The condition is one which comes into operation when, notwithstanding the lien in favour of the carrier for which it provides (whatever that lien is), another party claims that the carrier must deliver the goods, because, as that party asserts, there is no subsisting lien in favour of the carrier.

The condition deals with two liens, the one the carrier's common law lien for charges for carriage, the other the contractual lien created by the words on which the question arises. The vendor consigning the goods may, of course, give such rights paramount to the right arising in himself upon stoppage in transitu as he thinks proper. It is said that by the first words of the clause he has given such a paramount right to the carrier's common law lien. This seems to me erroneous. That paramount right existed already. The consignor could not give the carrier that which the carrier already possessed. By the next words the consignor gives some paramount right. What is it? There are three possible meanings. First, the words may mean to grant in priority to the right of the unpaid vendor a right in the carrier to a charge on the goods for any money due from the consignor; or secondly, to a charge for any money due from the consignee; or thirdly, to a charge for any money due from such person (whoever he turns out to be) as is entitled to claim and claims delivery of the goods.

My Lords, to my mind the third is the only reasonable or possible meaning of the words. The first meaning would render it impossible for the consignee (if entitled to delivery) to get the goods without paying the consignor's debt, howsoever arising. The second would render it impossible for the consignor (if entitled to delivery) to get the goods without paying the consignee's debt, howsoever arising. The third is perfectly intelligible, and strictly pertinent to questions arising when some one comes and demands delivery and is met by the assertion of a lien in favour of the carrier, who in the absence of a lien would be bound to deliver.

The word "owners" means, I think, "persons entitled to claim and claiming delivery." This is the meaning which

Pickford J. gave to the word, and in my opinion he was right in that view.

My Lords, for these reasons I think that this appeal succeeds.

Order of the Court of Appeal reversed and judgment of Pickford J. restored. The respondents to pay the costs in the Courts below and also the costs of the appeal to this House.

Lords' Journals, July 13, 1915.

H. L. (E.)
1915
UNITED STATES STEEL PRODUCTS COMPANY *v.* GREAT WESTERN RAILWAY.

Solicitors for appellants : *A. J. Greenop & Co.*
Solicitor for respondents : *L. B. Page.*

[HOUSE OF LORDS.]

GENERAL COMMISSIONERS FOR THE PURPOSES OF INCOME TAX FOR KENSINGTON . . . . . APPELLANTS ;

AND

ARAMAYO . . . . . RESPONDENT.

H. L. (E.)*
1915
July 28.

Revenue — Income Tax — Sched. D — Foreign Possessions — Place of Assessment — Jurisdiction of Commissioners at Place of Residence — Prohibition — Income Tax Act, 1842 (5 & 6 *Vict. c.* 35), *ss.* 106, 108.

The duty of the additional Commissioners under the Income Tax Acts is to make a preliminary ascertainment of the amount of duty to be charged, subject to confirmation by the General Commissioners, whose function it is to impose liability upon the taxpayer, and an assessment is not operative until signed and confirmed by the General Commissioners.

Sect. 106 of the Income Tax Act, 1842, contains an exhaustive classification of the persons subject to duty under Sched. D and deals exhaustively (apart from the special provisions of s. 48) with the question where such persons are chargeable, except in the case of profits arising from foreign possessions, which is dealt with by s. 108 to the exclusion of s. 106 ; and, with that exception, a person subject to duty under Sched. D is chargeable in one place only, to be ascertained from the provisions of s. 106.

The second class mentioned in s. 106, which comprises persons engaged in trade, includes a person engaged in trade as a partner.

The words " shall be chargeable " used in reference to the second

* *Present :* EARL LOREBURN, LORD ATKINSON, LORD PARKER OF WADDINGTON, LORD SUMNER, LORD PARMOOR, and LORD WRENBURY.

H. L. (E.)
1915
KENSINGTON INCOME TAX COMMISSIONERS v. ARAMAYO.

class have the same meaning as the words "shall be charged" used in respect of the three other classes mentioned in the section, and create an exclusive and not an alternative place of charge.

Sect. 108, which provides that the duty in respect of profits arising from foreign possessions "may be . . . . assessed" in London, Bristol, Liverpool, and Glasgow, and "shall be . . . . assessed and charged by the Commissioners acting for such of the said places at or nearest to which such property shall have been first imported into Great Britain," is not optional but imperative, and is to be read as a proviso on and as creating an exception to s. 106, so that profits arising from foreign possessions are to be charged exclusively at the place therein provided.

Semble, s. 48, which provides for the assessment of persons neglecting or refusing to make the returns required by the Act, does not empower the Commissioners to assess the taxpayer in the sense of imposing a liability upon him.

Where, therefore, a householder resident in Kensington carried on trade in the city of London and was formerly also a member of a foreign firm (which carried on no trade and owned no possessions in the United Kingdom) and received profits from the business of the foreign firm in the city of London :—

Held, that the Commissioners for Kensington had no jurisdiction to assess him in respect of such profits, and that the Commissioners for the city of London were the proper authority to make the assessment. (1)

Decision of the Court of Appeal [1914] 3 K. B. 429 affirmed.

APPEAL from an order of the Court of Appeal (2) reversing an order of the Divisional Court (3) which discharged a rule nisi

(1) By s. 32 of the Finance (No. 2) Act, 1915, passed on December 23, 1915, "(1.) Notwithstanding anything in section one hundred and six or one hundred and forty-six of the Income Tax Act, 1842, or in any other enactment relating to income tax, a person may be charged to income tax under Schedule D. or E., whether or not he is engaged in any trade, manufacture, adventure, or concern, or any employment, vocation, or office, by Commissioners acting for any parish or place in which that person ordinarily resides ; and if any person has been so charged before the commencement of this Act, the charge shall not be deemed invalid by reason of that person not having been charged by the right Commissioners :

"Provided that nothing in this section shall affect the operation of section one hundred and seventy-one of the Income Tax Act, 1842, with respect to double assessments.

"(2.) Section one hundred and eight of the Income Tax Act, 1842 (which makes provision as to the place at which persons are to be assessed to income tax in respect of profits or gains arising from foreign or colonial possessions or securities), is hereby repealed."

(2) [1914] 3 K. B. 429.

(3) [1913] 3 K. B. 870.

obtained on behalf of the respondent calling on the appellants, the General Commissioners for the Purposes of the Income Tax for the district of Kensington, to show cause why they should not be prohibited from proceeding on certain assessments made upon the respondent in respect of profits of foreign property alleged to be derived from a firm of Aramayo, Francke & Co., which formerly carried on business in Bolivia. These assessments were as follows :—

No. 1. An additional first assessment to the amount of 20,000*l.* under Sched. D of the Income Tax Acts for the year ending April 5, 1908, in respect of " foreign possessions," the income tax payable being 1000*l.* and the assessment having been signed by the additional Commissioners for the division of Kensington, in the county of Middlesex, on February 25, 1909, and allowed and confirmed by the General Commissioners for Kensington on May 6, 1909.

No. 2. A similar assessment to the above for the year ending April 5, 1909, on " foreign possessions," to the amount of 10,000*l.*, the income tax payable being 500*l.*, signed by the additional Commissioners for Kensington on October 14, 1910, and allowed and confirmed by the General Commissioners on January 20, 1911.

No. 3. A similar assessment for the year ending April 5, 1910, on " foreign possessions," to the amount of 10,000*l.*, the income tax payable being 583*l.* 6*s.* 8*d.*, signed by the additional Commissioners for Kensington on October 14, 1910, and allowed and confirmed by the General Commissioners on January 20, 1911.

No. 4. A first assessment for the year ending April 5, 1911, on " foreign possessions," to the amount of 10,000*l.*, the income tax payable being 583*l.* 6*s.* 8*d.*, signed by the additional Commissioners for Kensington on October 14, 1910, and allowed and confirmed by the General Commissioners on December 2, 1910.

No. 5. A further additional first assessment for the year ending April 5, 1908, on " foreign possessions," to the amount of 10,000*l.*, the income tax payable being 500*l.*, signed by the additional Commissioners for Kensington on March 31, 1911, and allowed and confirmed by the General Commissioners on May 25, 1911.

The respondent since 1903 had been a partner in the firm of Avelino Aramayo & Co., which until 1912 carried on business at 52, Billiter Buildings, Billiter Street, in the city of London, and had

H. L. (E.) 1915

KENSINGTON INCOME TAX COMMISSIONERS v. ARAMAYO.

since carried on business at 148½, Fenchurch Street. He was also the owner of a private residence in Cromwell Road, Kensington. Prior to January 12, 1907, the respondent was also a partner in the firm of Aramayo, Francke & Co., which owned possessions and carried on trade in Bolivia and did not own any possessions or carry on any trade in the United Kingdom.

On January 12, 1907, the business and possessions of the firm were transferred to Aramayo, Francke & Co., Limited, a company incorporated in the United Kingdom and resident at 52, Billiter Buildings aforesaid.

In the returns made by the respondent for the years in question he had returned " nil " in respect of foreign possessions.

On September 21, 1908, the surveyor of taxes for the city of London wrote to the respondent and asked him whether he was a member of the firm of Aramayo, Francke & Co. before it was made into a public limited company, and, if so, whether he would state the amount of profits received by him from the firm for the years 1905, 1906, and 1907. Having received no reply to this letter, the surveyor inquired personally at the offices of the respondent's firm in the city of London and was informed by the accountant clerk there that profits had been made in Bolivia by Aramayo, Francke & Co. before it was formed into a company, but that he had no knowledge whether or not such profits had been remitted to the United Kingdom.

On February 23, 1909, the surveyor of taxes for the Kensington district wrote to the respondent saying that a question had arisen as to his liability to assessment in respect of profits derived by him from Aramayo, Francke & Co. prior to possession being given to the company, and on February 25, 1909, the additional Commissioners for the Kensington district signed an additional first assessment in respect of such profits for the year 1907-8 (assessment No. 1), and notice of this assessment was duly served on the respondent by the clerk to the appellants.

On March 15, 1909, the respondent informed the said clerk that the duty for the period applied for had already been paid in the city of London on all his income under Sched. D. After some further correspondence the appellants, on May 26, 1909, issued a precept requiring the respondent to return a schedule containing the amount

of the remittances to the United Kingdom to him or on his account during each of the years ended respectively April 5, 1905, 1906, and 1907, in respect of profits, interest, and partners' drawings from the business formerly carried on under the name of Aramayo, Francke & Co. This precept did not reach the respondent, but he received a copy thereof on March 7, 1910, and on March 15 he repeated his statement that all duty payable by him for the period applied for had already been paid in the city of London.

On October 14, 1910, further assessments in respect of such profits (being Nos. 2, 3, and 4) were signed by the additional Commissioners for the Kensington district, and notices of these assessments were served on the respondent.

On December 1, 1910, the collector for the appellants levied a distress on the goods of the respondent at his private address in respect of assessment No. 1, and the sum of 1013*l.* 11*s.*, the amount of the levy and costs, was paid under protest by the respondent to the collector.

On March 31, 1911, the additional Commissioners for the Kensington district signed a further additional assessment on the respondent for the year ended April 5, 1908 (assessment No. 5), and notice of this assessment was served on the respondent This additional assessment was confirmed, as above stated, by the General Commissioners on May 25, 1911.

The respondent did not appeal against these assessments, but on May 26, 1911, he obtained from the Divisional Court (Lord Alverstone C.J. and Scrutton J.) a rule nisi requiring the appellants to show cause why a writ of prohibition should not be awarded to prohibit them from proceeding on any of these assessments on the following grounds: (1.) that the property from which the profits were derived had been wholly transferred away from the respondent and that such profits had wholly ceased before April 6, 1907, the first of the years of assessment; (2.) that the whole of the profits on which such assessments purported to be based were received prior to April 5, 1907, and might have been assessed prior to the commencement of the Finance Act, 1907, and therefore could not legally be assessed later than April 5, 1908; (3.) that the whole of the profits on which such assessments purported to be based were profits and gains arising from foreign possessions and were received

H. L. (E.) 1915

KENSINGTON INCOME TAX COMMISSIONERS v. ARAMAYO.

in the city of London and not elsewhere, and were by virtue of s. 108 of the Income Tax Act, 1842, assessable by the Commissioners for the city of London and not elsewhere; (4.) that the further additional first assessment for the year ended April 5, 1908 (assessment No. 5), was not made within three years after the expiration of the year of assessment, contrary to s. 23 of the Finance Act, 1907.

On cause being shown affidavits by the surveyors of the Kensington and city of London districts were filed on behalf of the appellants to the effect that they had grounds for concluding from the circumstances attending the transfer of the business of Aramayo, Francke & Co. to the limited company of that name, and from the fact that the respondent had never denied the receipt of profits from foreign possessions, that he had received remittances from the firm earned prior to the transfer during the years covered by the assessment. The surveyor for Kensington stated that from the size of the business taken over by the limited company the profits up to the date of transfer by the vendor partners could not have been ascertained, realized, and remitted at once, but that such ascertainment, realization, and remitting must have taken some considerable time. He was accordingly satisfied that this was a case for an additional first assessment. The effect of this evidence is fully stated in the report of the case before the Court of Appeal. The respondent in an affidavit in reply stated that since the date of the transfer no profits from the business of the firm other than dividends on shares owned by him in the limited company had been received by him or on his behalf in the United Kingdom. The case was heard before a Divisional Court consisting of Bray, Avory, and Lush JJ.

During the hearing of the case the respondent applied for leave to amend the grounds on which the rule had been granted by adding that he was not liable to be assessed by the appellants by virtue of s. 106 of the Income Tax Act, 1842, inasmuch as while residing in Kensington he was engaged in business elsewhere than in Kensington, namely, in the city of London, but leave to amend was refused.

The Divisional Court discharged the rule.

The Court of Appeal (Cozens-Hardy M.R., Swinfen Eady and Pickford L.JJ.), after reserving judgment, intimated to the parties that in their opinion the Divisional Court were wrong in refusing

leave to amend and ordered the case to be re-argued upon the question of the construction of s. 106. They ultimately allowed the appeal upon the ground that, upon the true construction of s. 106, the jurisdiction to make the assessments on the respondent resided not in the appellants, but in the Commissioners for the city of London, and ordered that a writ of prohibition be awarded in respect of all the assessments, except assessment No. 1, as to which there were no longer any proceedings to be prohibited.

1915. June 10, 11, 14, 18. *Sir R. Finlay*, *K.C.*, and *W. Finlay*, *K.C.* (*Sir Frederick Smith*, *S.-G.*, and *A. M. Bremner* with them), for the appellants. The assessments in question in this case were made by the Kensington Commissioners under s. 52 of the Taxes Management Act, 1880, as amended by the Finance Act, 1907, upon an intimation from the surveyor of the district that he had reason to believe that the respondent had been receiving remittances from foreign possessions in Bolivia. The respondent, instead of appealing, applied for a writ of prohibition, and the only substantial ground for the application was the third ground stated in the rule nisi, namely, that under s. 108 of the Income Tax Act, 1842, the proper persons to make the assessments were, in the circumstances of the case, the Commissioners for the city of London. The Divisional Court decided in favour of the Crown upon the construction of s. 108 and refused an application by the respondent for leave to amend the rule by bringing in s. 106. The Court of Appeal did not differ from the decision of the Divisional Court upon the construction of s. 108, but treated the rule as amended and decided in favour of the respondent upon s. 106. They decided in effect that whenever a man carries on business elsewhere than at his place of residence all assessments under Sched. D must be made at his place of business. But, first, the Court of Appeal were wrong in the circumstances in overruling the discretion of the Divisional Court upon the question of amendment: *Steward* v. *North Metropolitan Tramways Co.* (1); *Weldon* v. *Neal* (2); and, secondly, their decision upon the merits proceeded upon a misconception of s. 106. The effect of the section is merely that a man who carries on business elsewhere than at his place of residence may be assessed in respect of that business at

(1) (1886) 16 Q. B. D. 556. (2) (1887) 19 Q. B. D. 394.

H. L. (E.) 1915

KENSINGTON INCOME TAX COMMISSIONERS v. ARAMAYO.

his place of business. The section was not intended to oust the jurisdiction of the Commissioners to assess him at his place of residence, but superimposes upon the taxpayer an additional liability to assessment to that already existing. That is indicated not only by the general scope of the section, but more markedly by the variation in its language in dealing with the second case—the case of a person engaged in trade. The words in that case are not "shall be charged," as in cases I., III., and IV., but "shall be chargeable." That is equivalent to may be charged. The scheme of the Act of 1842 is that the primary liability of the subject is to assessment at his place of residence, and this has been the uniform practice of the Commissioners. [They referred to ss. 46, 47, 48, 50, 52, 55, 110, 111, 113.] Sect. 171, which provides against double payment, imports that more than one set of Commissioners may have jurisdiction to make assessments. Further, the exception in s. 106 does not include the case of a man trading as a member of a firm, but is confined to the case of a man carrying on a trade by himself. [They referred to rr. 3 and 5 of the rules applicable to the first and second cases under Sched. D and to s. 20 of the Finance Act, 1907.] Lastly, s. 106 contemplates that a man may be carrying on business in several places. If the effect of the section is that other sources of income are to be returned at the place where he carries on business, at which of his places of business is the return to be made? That is a further argument in favour of the construction contended for by the Crown.

G. M. Edwardes-Jones and *K. E. Chalmers*, for the respondent. As to leave to amend, the rule nisi for a writ of prohibition must state clearly the excess of jurisdiction relied on, but need not state exhaustively the grounds of that excess: *Eversfield* v. *Newman*. (1) It was therefore unnecessary to specify any section of the Act in the third ground. Nor can it be said that the Crown was misled by being referred to s. 108, for the Solicitor-General (Sir John Simon) himself referred to s. 106 and said that if the application had been based upon that section he might have had great difficulty in answering it; and s. 108 itself drives one back to s. 106 by saying "as if for a trade exercised in the city of London." Moreover, it had never been previously suggested that s. 106 was the appropriate

(1) (1858) 4 C. B. (N.S.) 418.

section. On the contrary, it has been consistently stated in the text-books from the time of the passing of the Act that the section under which foreign profits are assessed is s. 108 : Pratt's Income Tax ; Dowell on Income Tax in all its editions ; Sir F. Gore's article on Income Tax in the Laws of England. That article may be cited as expressing the official view of the Act and as disposing of the contention of the Crown that it has been the uniform practice of the Commissioners to make the assessment at the place of residence. Either no amendment was needed to bring in s. 106, or, if the amendment was needed, it was rightly allowed. In the original Income Tax Act of 1799 (39 Geo. 3, c. 13) the very practice now contended for by the Crown was adopted. A complete return of income from all sources was required at the place of residence, subject only to the right of a person engaged in trade to elect to be assessed in respect of his trade by one of three sets of commercial Commissioners appointed by the Act. This was found to be so onerous that a substituted system was provided by the Income Tax Act of 1803 (43 Geo. 3, c. 122), and in lieu of a general return particular returns of income from particular sources were substituted. That was followed by the Income Tax Act of 1806 (46 Geo. 3, c. 65), of which the Income Tax Act of 1842 is practically a reprint. Sect. 117 of the Act of 1806 corresponds with ss. 106 and 108 of the Act of 1842 and deals completely with the question where profits are to be charged. It contains an exhaustive description of the profits to be charged, which are divided into five classes, and of the places where they are to be charged. Of these profits the first four classes are contained in s. 106 and the last class—profits from foreign possessions—is to be found in s. 108. It is a reasonable and indeed an almost irresistible inference that these two sections together exhaustively describe the sources of income to be charged, and that s. 108 is the part which exclusively deals with profits from foreign possessions. Further, s. 108 is not optional but imperative. The decision of the Divisional Court involves inserting words into the section for which there is no justification. The observations of Lord Herschell in *Colquhoun* v. *Brooks* (1) meet every point in the case. He says that s. 108 is imperative and that no other section deals with profits arising from foreign possessions and that the

(1) (1889) 14 App. Cas. 493, at pp. 506 and 507.

H. L. (E.) 1915

KENSINGTON INCOME TAX COMMISSIONERS v. ARAMAYO.

person in receipt of such profits is treated as carrying on trade at the place of importation. It follows that in this case the profits in question can only be assessed by the Commissioners for the city of London. The Crown relies upon s. 52 of the Act of 1880, but if the word "discover" in that section is to be used for the purpose of founding jurisdiction the answer is that the surveyor cannot discover something unless there is something to be discovered: *New South Wales Taxation Commissioners* v. *Adams*. (1) There is no jurisdiction to make an additional assessment in respect of profits from foreign possessions in the absence of evidence that some such profits have in fact been received in the United Kingdom, and here there was no such evidence. The appellants claimed to assess the respondent in respect of income alleged to have been received prior to April 5, 1907, which was within the proviso in s. 23 of the Finance Act, 1907, so that the extension of the period for additional first assessments allowed by that section did not apply and all the assessments in question were made outside the limits prescribed by statute. Further, as regards assessment No. 5, it was not "made" within the meaning of s. 23 of the Finance Act, 1907, until it was confirmed by the General Commissioners: see *Parrish* v. *Hackney Corporation* (2); and, if so, it was out of time.

It is said that s. 52 of the Taxes Management Act, 1880, gives jurisdiction, where that section applies, to the additional Commissioners to "make" an assessment, but the word "make" may be used to signify any or all of the processes required to perfect anything, and what the additional Commissioners do is merely preliminary to the acts of the General Commissioners, which alone can make the assessment effective. This appears from s. 82 and the following sections of the Taxes Management Act, 1880, which give effective force to an assessment, and do not give it unless and until the assessment has been signed and allowed by the General Commissioners pursuant to s. 56. All that the additional Commissioners can do is preliminary and is merely an administrative process for arriving at the amount in order that they may certify it to the General Commissioners. This is made clear by the statutory form (Taxes Management Act, 1880, Sched. II., 2) and by the actual assessments set out in the appendix to the case, which describe the assessments

(1) [1912] A. C. 384, at p. 391. (2) [1912] 1 K. B. 669.

as "made by the Commissioners" whose names appear at the end thereof, i.e., by the General Commissioners, and refer to the signature of the additional Commissioners as certifying the amount assessed. The same argument applies equally to the sections of the Income Tax Act, 1842, which enable the additional Commissioners to make assessments, e.g., s. 113: the assessments so made are merely preliminary and are not effectively made until they have been made by the General Commissioners acting judicially pursuant to ss. 120 to 126.

If the respondent is wrong upon s. 108 he is entitled to succeed upon s. 106. That section, as was admitted by the Solicitor-General in the Courts below, applies to a person engaged in trade as a partner as well as to a sole trader. [They also referred to *Elston* v. *Rose* (1) on the question whether prohibition would lie and *Maughan* v. *Edinburgh and District Water Trust* (2) on the question whether the Commissioners were out of time.]

Sir R. Finlay, K.C., in reply. On the question whether the Commissioners are out of time, under s. 52 of the Act of 1880, as amended by the Act of 1907, the act to which the time limit relates is the making of the assessment by the additional Commissioners. As to s. 108 of the Act of 1842, the language shows that it merely gives a power to the taxpayer to choose his tribunal, and the decision of the Divisional Court, from which Swinfen Eady L.J. did not differ and with which Pickford L.J. in terms agreed, is correct.

The House took time for consideration.

July 28. LORD WRENBURY. (3) My Lords, this case affords a striking illustration of the involved and almost unintelligible expression of the law contained in the statutes relating to income tax. It is difficult to reconcile one section with another. The same word is used here in one sense and there in another. There is no sequence or orderly arrangement of matter. Your Lordships will, I hope, agree with me in thinking that a taxing statute, particularly one upon which taxation to so large an amount is now collected, ought to be expressed in plain language, free from the

(1) (1868) L. R. 4 Q. B. 4. (2) (1886) 13 R. 1046.
(3) Read by Lord Atkinson.

H. L. (E.) 1915

KENSINGTON INCOME TAX COMMISSIONERS v. ARAMAYO.

Lord Wrenbury.

defects to which I have pointed, and that the matter demands, as soon as opportunity offers, the early attention of the Legislature.

The task of interpreting the statute with reference to the case before the House is not easy. But the relevant sections may, I think, be grouped under two heads.

The first head contains clauses which may be called administrative. They are clauses which relate to the collection and enforcement of information and the ascertainment from those materials of the amount in respect of which the taxpayer is chargeable. The second head contains clauses which may be called executive. They set up a tribunal empowered to review the work done under the former class, and to impose upon the taxpayer liability in respect of the amount ascertained.

The question upon this appeal is whether the General Commissioners for the Purposes of the Income Tax Acts for the district of Kensington are the proper tribunal to fix Mr. Aramayo, the respondent to this appeal, with liability. He says they are not. He claims to prohibit them from proceeding on certain assessments, because whether the assessments were, as matter of figures, right or wrong, the Commissioners for Kensington had not, he said, jurisdiction to affect him in the matter.

My Lords, I do not think it necessary to travel through what I have called the administrative clauses in detail. They provide for the appointment of assessors and collectors (Act of 1842, s. 36), of additional Commissioners (1842, s. 16) who are not General Commissioners (1842, s. 21), and they define their powers and duties, namely, for example, the service of notices (1842, ss. 46—48), the making of lists of the persons served (1842, s. 57), and the making of assessments which they are to deliver to the General Commissioners (Act of 1880, ss. 49, 50). The assessments thus made are spoken of as well by the word " charge " as by the word " assessment." An assessor is said to " charge and assess " (see, e.g., Act of 1880, s. 46, sub-ss. 2 (ii.), 3 (*c*)). A charge is spoken of as made upon a person by an assessment (1880, s. 57, sub-s. 6). A surveyor is spoken of as making a charge upon a person (1880, s. 58). A person is spoken of as charged by the certificate of a surveyor (1880, s. 65, sub-s. 1). Additional Commissioners are said to make an assessment in such sum as, according to their judgment, ought

to be charged (1880, s. 52, sub-s. 2). But the assessment is one thing and the charge of the assessment upon the taxpayer is another (see, e.g., 1880, s. 55). When the assessments have been made and delivered the General Commissioners are to take them into consideration (1880, s. 56). It is for the General Commissioners to execute the Act (1842, s. 22). The acts of the assessors and additional Commissioners are no more than subordinate and preliminary. In these Acts it is not possible to rest any conclusion upon a particular word. The same word is in one section used in one sense and in another in a different sense. This preliminary ascertainment of amount is, however, generally spoken of by the verb "assess" and its result by the noun "assessment." But it is equally true that the final act of imposing liability on the taxpayer is spoken of sometimes by these same words, but sometimes also by the word "charge." In popular language also the taxpayer is said to be "assessed" when the meaning is that he has been rendered liable to pay. On the other hand, the word "charge" is sometimes used to express the preliminary act done by the subordinate officer, the assessor, and also, as I shall presently show, to express the final act done by the General Commissioners in fixing liability on the taxpayer. When the assessors and the additional Commissioners have done their work there may be an appeal (1842, ss. 118 et seq.; 1880, ss. 57 et seq.). When all this is completed, the administrative clauses, as I term them, have done their work.

The next step is that liability is to be imposed upon the taxpayer in respect of the amount ascertained. This is the work of the General Commissioners. The assessments have no operation until they have been signed and allowed by the General Commissioners (see, e.g., 1880, s. 30). The matter will be found summarized in the Commissioners' certificate of assessment in Forms 2 and 4 of the Second Schedule to the Act of 1880 (see 1880, s. 15). The form runs thus: The particulars of assessment are stated. The additional Commissioners certify them. Then after stating that the assessments have been presented and all appeals heard, the General Commissioners allow and confirm them. The General Commissioners are the authority, and the only authority, to do this last act, being the act which makes liability for the amount attach to the taxpayer. The whole question upon this appeal is,

H. L. (E.) 1915

KENSINGTON INCOME TAX COMMISSIONERS v. ARAMAYO.

Lord Wrenbury.

who are the Commissioners who in the facts of this case can do this final act in the case of this particular taxpayer?

The clauses which I have called executive are the clauses which determine who are the Commissioners who are by the Act constituted the tribunal to do this act. I have found only two sections of the Act which fall within this class. They are ss. 106 and 108 of the Act of 1842. Your Lordships have been pressed in argument with the contention that s. 48 of that Act is another. In my opinion it is not. The words relied on are the words at the end of s. 48, "And the said Commissioners shall moreover proceed to assess or cause to be assessed every person making such default in the manner herein directed." I do not rely upon the fact that the verb here is "assess," not "charge." As I have said, no reliance can be placed upon an assumption of accuracy in the use of language in these Acts. I look at the section as a whole. It is one by which the assessor is to give notice to every person chargeable in respect of property or profits within his district requiring him to deliver all such lists, &c., as he is required to deliver under the Act. That district, therefore, will obtain a return of the taxpayer's property in all districts. It is a fact, and it is not disputed, that (however oppressive and unreasonable it would be) the taxpayer, if resident or carrying on business in more than one district, must, if required, deliver in each district a return of all his property in all districts (s. 110). But this is not so as regards either assessment or charge. As regards Sched. A, the Act works out with some care that assessment and charge shall be made in one place only, namely, the place where the property is situate, and contains provisions to deal with cases in which a parish is in two or more counties or districts, and in which a doubt arises as to the district or parish in which a person ought to be assessed (1880, ss. 53, 54). The Act contemplates throughout, I think, only one tribunal which shall affect the taxpayer with liability. If the contention upon s. 48 is right, the taxpayer will, if he makes default, be liable to be assessed (in the sense of having liability imposed upon him) in every one of these districts. And one district may take one view as to the amount, and another district another view. It is true that the Act makes provision against double charge, and that he will not have to pay twice; but if the amounts in the different districts vary, which is to prevail? Moreover, if he does not make

default, the authority to assess under this section does not arise. So that liability could be imposed upon him by one set of Commissioners if he did and by another if he did not make default. The argument that s. 48 is a section under which liability can be enforced upon the taxpayer is, I think, untenable. It is based upon the assumption that the verb "assess" bears the meaning "impose liability upon." That is only one of its meanings. The meaning here is that which it bears in the administrative clauses, i.e., ascertain the amount with which the person ought to be charged, leaving that charge to be imposed by the appropriate tribunal.

From s. 171 also it results that the taxpayer can be assessed in the sense of being charged or rendered liable in one place only. If he be assessed in more than one place it is by "error or mistake."

My Lords, it remains to construe ss. 106 and 108. Sect. 106 deals with four classes of persons—(1.) the householder who is not engaged in trade, (2.) the person engaged in trade, (3.) the person who is neither a householder nor engaged in trade who has a place of ordinary residence, and (4.) every person not before described. The section does not say "engaged in trade in Great Britain"; but that must, I think, be the meaning, for the second class are to be chargeable by the Commissioners acting for the place where the trade is carried on, whether the trade is carried on wholly or in part only in Great Britain; and if this is the meaning in the words defining the second class it must also, I think, be the meaning of the same words in the definition of the first class. As regards classes (1.), (3.), and (4.), the words of the section are "shall be charged"; as regards class (2.) they are "shall be chargeable." My Lords, I can assign no reason for the change of language. From a change of language I should, in the absence of other considerations, infer a change of meaning. But I cannot do so in this case. There are no alternative persons named who are to charge this taxpayer if those persons do not charge him—either the persons authorized to charge him are defined here or they are not defined at all. The change of language is attributable only, I think, to the very indifferent drafting which is found throughout this most complicated and ill-digested Act.

The appellants' argument is that s. 106 is to be read as if the second head of the charge were expressed in the words "and every

H. L. (E.) 1915

KENSINGTON INCOME TAX COMMISSIONERS v. ARAMAYO.

Lord Wrenbury.

person engaged in trade . . . . shall *also* be chargeable *in respect thereof* . . . .," introducing the words "also" and "in respect thereof." There are cogent reasons, I think, for rejecting this argument:

First, the second head does not define the same class of persons as are excepted from the first head. It defines the excepted class and others. For it defines persons engaged in trade, whether householder or not. The word "also" therefore cannot be supported.

Secondly, the frame of the clause is to define classes of persons and say where they shall be charged or shall be chargeable. There is no sub-division addressed to the classes of property in respect of which they are so charged or chargeable. The language of the section is that they are charged or chargeable (i.e., in respect of everything), not that they are charged or chargeable for some defined thing. The words "in respect thereof" therefore cannot be supported.

Thirdly, this section and also ss. 110 and 171 seem to me to contemplate some one definite place where the taxpayer is to be charged. Sect. 110 requires delivery in every place there mentioned of the like lists "as he is hereby required to deliver in the parish or place where such person ought to be charged." And this s. 106 provides that "in order that the place where the said last-mentioned duties" (Sched. D) "are to be charged may be ascertained" the taxpayer is to deliver a declaration in writing declaring in what place he is chargeable, and if he is engaged in trade is to declare the place where the same is carried on. The former of these is sufficient if he is of the first, third, or fourth class, the latter is further wanted if he is of the second class. The strength of the appellants' argument lies in the fact that the words "shall be chargeable" in the second head differ from the words "shall be charged" in the first, third, and fourth heads. The difference, although hard to explain, does not lead me to the conclusion for which the appellants contend, namely, that the second head creates an alternative and not an exclusive place of charge. If it is alternative, then the section fails to name the other supposed alternative place of charge, for the second class, having been already described in the section, are not within the fourth class, "Every person not hereinbefore described,"

and consequently are not included in the section at all except to the extent of that which is called the alternative direction to charge.

If s. 106 applies, it results that the respondent, being engaged in trade in the City, is "chargeable," i.e., is to be charged, in the City, where his trade is carried on. If so prohibition ought to go.

But in my judgment s. 108, and not s. 106, is the section which governs this case. These two sections reproduce that which in 46 Geo. 3, c. 65, s. 117, was contained in a single section. In that section that which is s. 108 of 1842 is expressed as a proviso upon that which is s. 106 of 1842. Sect. 108 I think is to be read in the Act of 1842 as a proviso upon s. 106, qualifying and excluding that section in the cases to which it applies.

The persons or any of the persons named in s. 106 may, of course, own foreign possessions. Sect. 108 names another tribunal which is to charge in the case to which s. 108 applies. It follows that s. 108 must necessarily qualify s. 106. Sect. 108, in the fifth line, uses the words "may be stated to and assessed by," and in the tenth line uses the words "shall be stated to and assessed and charged by." The contention is raised that by the words "may be stated to" the section does no more than offer an option to the taxpayer, and that unless the option is exercised the section does not apply. My Lords, I cannot accept this contention. The words "may be stated to and assessed by" do no more, I think, than enlarge the bodies of persons to whom and by whom, under s. 110, the duty could otherwise be stated and assessed. The owner of the foreign possession may be neither resident in nor carrying on business in London, and would not be assessable in London at all but for this section. He may, however, reside nearer to London than to either Bristol, Liverpool, or Glasgow. Under these circumstances he may make his statement to and shall be assessed by London under s. 108. Sect. 108 is, I think, a section which excludes s. 106 in the cases to which it applies.

Further, it is perhaps worthy of notice (although I place but little reliance upon any assumption of verbal accuracy) that the words in the tenth line are not the same as, but are larger than, those in the third line, for the words "and charged" are found in the former and not in the latter.

My Lords, I go on to apply these principles to the facts of the

H. L. (E.) 1915

KENSINGTON INCOME TAX COMMISSIONERS v. ARAMAYO.

Lord Wrenbury.

present case. Mr. Aramayo at the date of the assessments in dispute lived in Kensington, and was a partner in Avelino Aramayo & Co., carrying on business in the City. The assessments in dispute are not in respect of his general income, nor in respect of his City business. In respect of both of these he has been assessed and has paid the assessed amounts. The assessments in dispute are in respect of profits of foreign property derived from a firm in Bolivia carrying on business there. This business was transferred in 1907 to a limited company. The Commissioners of Income Tax, however, are entitled to establish, if they can, that since the date of the transfer Mr. Aramayo has received profits of the firm earned before the transfer and not included in the transfer. Whether this is so or not is a question of fact with which your Lordships are not concerned. But it is said the assessment in question is not in respect of the profits of the City business, but of the Bolivian business, and he is a householder not engaged in any trade in Great Britain in the sense that it is not that trade that is here in question, and that he is therefore for this purpose a householder not engaged in any trade, and is within the first head and is to be charged by the Kensington Commissioners. The contention is, I think, inadmissible. The same person is not engaged in trade in Great Britain for one purpose and not so engaged for another. The respondent is engaged in trade, and if s. 106 applies it is the City, and not Kensington, which is the tribunal to assess him.

But it is, as I have said, in my judgment, not s. 106 but s. 108 that applies. If the subject of assessment is a foreign possession, s. 108 applies, to the exclusion of s. 106. The question as to amendment therefore does not, I think, arise. Under s. 108 it is not the place of residence nor the place of trade which governs the matter. The inquiry is which of the four places—London, Bristol, Liverpool, and Glasgow—is nearest to the residence of the person to be charged. The answer in the present case is London. It results, therefore, that as regards this foreign possession the respondent is assessable in London, and (in the language of s. 108) not elsewhere. The Kensington Commissioners therefore have no jurisdiction, and the prohibition must go.

My Lords, it follows that, in my opinion, this appeal should be dismissed with costs.

LORD ATKINSON. My Lords, I beg to express my concurrence in the judgment I have read, and I move accordingly that the appeal be dismissed with costs.

LORD PARKER OF WADDINGTON. (1) My Lords, I agree.

The provisions of the Income Tax Acts, so far as they bear upon the question your Lordships have to decide, are analysed so fully in the opinions of my noble and learned friends Lords Parmoor and Wrenbury that there is no necessity for me to refer to them in detail. I should like, however, to state generally the process by which I have been led to the conclusion that this appeal fails.

If your Lordships will turn to the 171st section of the Act of 1842 you will find that it provides a remedy in the case of any person being "assessed" more than once for the same cause and on the same account and for the same year. The words "assessed" and "assessment," as used in this section, refer to that which creates a charge upon the person assessed, and not to that which ascertains the amount on which such person is chargeable. The section contemplates that it can only be by some error or mistake that any person can be charged more than once in respect of the same duties. In such a case the person so charged is to apply to the Commissioners for General Purposes acting for the division or place "where he shall have been so assessed by error or mistake," and these Commissioners are to vacate the assessment upon the certificate of the Commissioners "by whom he should have been rightly assessed according to the provisions of the Act." There must, therefore, be some division or place in which every person ought to be charged. If he is charged elsewhere, it can only be by error, and the directions as to the division or place where such person ought to be charged are to be found in the Act itself.

My Lords, so far as Sched. D is concerned, the only sections which can be said to deal specifically with the division or place in which a person ought to be charged with duty are ss. 106 and 108. In s. 106 persons on whom duty may be charged under Sched. D are divided into four classes. First, there is the householder who is not engaged in any business or profession; he is to be charged in the parish or place where his dwelling-house is situate. Secondly, there is the

(1) Read by Lord Sumner.

H. L. (E.) 1915

KENSINGTON INCOME TAX COMMISSIONERS v. ARAMAYO

Lord Parker of Waddington.

person, whether a householder or not, who is engaged in any business or profession; he is to be chargeable in the parish or place where such business or profession is carried on, whether it be carried on wholly or in part only in Great Britain. Thirdly, there is the person who is neither a householder nor engaged in any business or profession; he is to be charged in the parish or place where he shall ordinarily reside. Lastly, there is the person who is neither a householder nor engaged in business or trade nor ordinarily resident in any particular parish or place; he is to be charged in the parish or place where he happens to be resident when the general notices required by the Act are given.

My Lords, this classification is clearly meant to be exhaustive, though some difficulties may arise as to whether this or that individual is included in this or that class. The Act contains special provisions dealing with some of these difficulties; for example, the case of a person who has two or more residences, or carries on business at two or more places. Each person making a return for the purposes of Sched. D is bound to state in what place he is chargeable, it being assumed that the directions contained in the Act are sufficient to enable him to do so. I cannot attach any importance to the fact that in the second class the word used is "chargeable," whereas in the other three classes it is "charged." Assuming that the Commissioners for any place will proceed to charge every person there chargeable—no very great assumption—it is immaterial for the purposes of the section which expression is used, and the Income Tax Acts are not remarkable for accuracy in the use of language. My conclusion is that, with the exception of the case specially dealt with in s. 108, there is one place only in which a person subject to duty under Sched. D is chargeable, and ought to be charged, and that this place is to be ascertained from the provisions of s. 106.

My Lords, the respondent is a householder in Kensington, but he is engaged in business in the city of London. He is not the sole proprietor of the business in question, but a partner therein only. I was inclined to think at first that class II. of s. 106 might possibly be held to exclude a partnership business, and that a similar construction might be placed on the exception to class I. I have, however, come to the conclusion that this would be doing some violence

to the language used. It follows that the respondent is in class II. and ought to be charged in the City and not elsewhere.

But even if this were not so, I still think that the Commissioners for Kensington exceeded their jurisdiction in charging him as they have affected to do. They have affected to charge him in respect of the profits received in Great Britain from a business wholly carried on abroad. A business carried on wholly abroad is a foreign possession within the meaning of case V., Sched. D (*Colquhoun* v. *Brooks* (1)), and the profits arising from it are chargeable under s. 108. I cannot agree that s. 108 is optional only. It must, I think, be read as a proviso on and as creating an exception to s. 106. It means that, notwithstanding the general terms of s. 106, the duties on profits arising from foreign possessions are to be charged at the place therein provided and not elsewhere. This construction is borne out by the fact that in the earlier Act of 46 Geo. 3, c. 65, the provisions of ss. 106 and 108 were contained in a single section.

Construed as above suggested, the Act does not, in my opinion, involve any difficulty in collecting the tax. The Crown can always ascertain the place where the taxpayer ought to be charged.

On the other hand, if construed as Sir Robert Finlay contends it ought to be, the Act might entail great hardship on the taxpayer. If assessable and chargeable in every place in which he can be compelled to make returns, he might be assessed in a dozen different places, have to appeal from a dozen different assessments, and finally to take proceedings under the 171st section, without being able to say which assessment had been rightly made or which assessment was made in error or by mistake.

My Lords, I will not refer in detail to any other of the sections which were discussed before your Lordships. It is enough to say that they do not in my opinion contain anything inconsistent with the conclusions at which I have arrived. They are sections conferring general powers on the Commissioners or additional Commissioners in every district, and must be read as subject to the express provisions of ss. 106 and 108.

EARL LOREBURN. (2) My Lords, the question in this case is whether Mr. Aramayo, who lived and possessed taxable property in

(1) 14 App. Cas. 493. (2) Read by Lord Atkinson.

H. L. (E.) 1915

KENSINGTON INCOME TAX COMMISSIONERS v. ARAMAYO.

Earl Loreburn.

Kensington, could be made liable for income tax under Sched. D by the General Commissioners of Kensington. I have studied these Acts very closely and have listened to the protracted arguments, and the conclusion at which I have arrived is that no one can give any answer to this question, either in the affirmative or in the negative, without doing violence to the language of one or more of the sections—that is, if he tries to give to the same words the same meaning in every section, such, for example, as the word "charge" and the word "assess." My conjecture is that the Legislature intended that any one who could be charged upon any property within a district might be charged in that district under Sched. D by the General Commissioners, and not merely assessed in that district by the additional Commissioners, and I do strongly think technical difficulties ought not to prevail to defeat the collection of any tax which has been imposed by the Legislature, but I have searched in vain to find warrant for holding that this is so.

I regret to say that in this respect the statutory language of the different Acts is not coherent. You may strain the language to mean either one thing or the other. You must strain it to arrive at any conclusion. On the whole I agree with Lord Wrenbury's view.

The point now to be decided has never been before Courts of law, and if it be true, as we were told, that the view I am obliged to take is fatal to the prevailing practice of taxing people on Sched. D in the place where they reside, I shall regret it. The business of collecting taxes is very necessary, and it must be very difficult with a tax upon income of the most diverse kinds derived from the industries of the whole kingdom. But there ought to be no difficulty, now that there have been so many decisions, in placing the law relating to this tax in clearly intelligible language. Certainly it is not so at the present time in regard to the question now before the House. I think this appeal fails.

LORD SUMNER. My Lords, I concur.

LORD PARMOOR. (1) My Lords, the question in this appeal is whether the appellants had jurisdiction to charge the respondent under Sched. D of the Income Tax Acts. The respondent resided

(1) Read by Lord Sumner.

within the district of Kensington, but has engaged in business in the City. The rule nisi was moved on the 26th day of May, 1911. It was granted upon four distinct grounds, but it is only necessary to refer to one of these : " The whole of the profits on which such assessment purports to be based were profits or gains arising from foreign possessions and were received in the city of London and not elsewhere, and were by virtue of section 108 of the Income Tax Act, 1842, assessable by the Commissioners acting for the city of London and not elsewhere." At the hearing before the Divisional Court an application was made to amend the above ground by inserting a reference to s. 106 of the Act of 1842. This application was refused. Sect. 106 is so material on the point of jurisdiction that it is impossible to decide the question of jurisdiction without reference to it. I fail to understand how s. 108 can be construed apart from s. 106.

In the Court of Appeal the amendment was allowed, but each party was left to bear his own costs there and below. The question whether prohibition will lie has not been argued, but I entertain no doubt that it is an appropriate remedy if the Kensington Commissioners have acted without jurisdiction.

The case made on behalf of the appellants is competently expressed in the reasons stated in their case. It is said that upon the true construction of the sections of the Income Tax Acts relating to the machinery of assessment the right to demand returns and to make assessments resides in the Commissioners of the place of residence of the person to be assessed. The word " assessment " is used in different parts of Income Tax Acts with different meanings, but if to make assessments is used in this passage as an equivalent to charges to the duties contained in Sched. D, I think that this reason cannot be maintained. Throughout the Acts there is a distinction between the right to demand returns and obtain information and the power to charge, and, for the reasons hereinafter stated, there is, in my opinion, no general power to charge to duties under Sched. D to be found in any of the sections of the Income Tax Act, 1842, before s. 106. I cannot assent to the argument that a power to charge can be found by implication in the previous sections, and obvious difficulties would arise if different bodies of Commissioners were empowered to charge independently of one another and not

H. L. (E.) 1915 — KENSINGTON INCOME TAX COMMISSIONERS v. ARAMAYO. — Lord Parmoor.

improbably at different figures. It is stated in a further reason that the jurisdiction to charge is not exclusive, and that it is the scheme of the Act that in some cases a right to charge is possessed by two sets of Commissioners, and that in the present case this jurisdiction has vested both in the Commissioners of the place of residence and in the Commissioners of the place of trade. The provisions of the Act are so complicated that it may be that in some cases a right to assess is possessed by two sets of Commissioners; but in the present case I can find no such power in the Commissioners of the place of residence, and the Kensington Commissioners, in my opinion, have acted without jurisdiction.

Sir Robert Finlay in his exhaustive argument called attention to ss. 46—50, and ss. 52, 55, 106, 108, 110, 111, 112, 113, 118, 131, and 171 of the Income Tax Act, 1842. Sects. 46—50 deal with the appointment of assessors and the giving and delivery of notices in the manner and within the time mentioned. The assessors have no power in this respect outside the town, parish, or place for which they act, and the Commissioners cannot give them authority outside the territorial limits of their own jurisdiction. At the end of s. 48 the Commissioners are ordered to assess or cause to be assessed, in the manner in the Act directed, every person refusing or neglecting to make out the required lists, declarations, or statements. It is difficult to say whether an assessment so made would charge to the duties contained in Sched. D, but the provision is only operative in the case of a refusal or neglect to make out the required lists, declarations, or statements, and has no application in the present case. Sect. 52 requires the person chargeable to return the amount of the profits or gains arising to such person from all and every the sources chargeable under the Act. The section contains no power of charging, and there is a clear difference between requiring duplicate returns and vesting a jurisdiction to charge in two different bodies. Sect. 55 imposes a heavy penalty on persons neglecting to deliver any list, declaration, or statement within the time limited by notice. None of these earlier sections to which the attention of your Lordships was directed confers a general power to charge the duties under Sched. D, and I agree with Pickford L.J. that until s. 106 is reached there is no section which states in what district a person shall be charged to the duties contained in Sched. D, with the

doubtful exception, in the case of a neglect or refusal to make the required returns, under s. 48.

Sects. 106 and 108 direct by what Commissioners persons shall be charged or chargeable to the duties contained in Sched. D. I think that the sections are, and are intended to be, exhaustive. Sect. 106 deals with four classes of persons. First, a householder, not engaged in any trade, manufacture, adventure or concern, or any profession employment, or vocation, is charged by Commissioners acting for the parish or place where his dwelling-house shall be situate. Secondly, every person engaged in any trade, manufacture, adventure or concern, or any profession, employment, or vocation, is chargeable where such trade, manufacture, or concern is carried on, or where such profession, employment, or vocation is exercised, whether wholly or in part only, in the United Kingdom. Thirdly, persons not being householders nor engaged in any trade, &c., are charged by the Commissioners acting for the parish or place where they shall ordinarily reside. And, fourthly, persons not thereinbefore described are charged by the Commissioners acting for the parish or place where such person shall reside at the time of beginning to execute the Act in each year by giving such general notices as are mentioned, or shall first come to reside after the time for giving such general notices. I doubt whether there is any difference between the words " shall be chargeable " in the case of persons engaged in trade and the expression " shall be charged " used with regard to the other classes of persons. In any case I cannot read the words " shall be chargeable " as equivalent to " may be charged." Should, however, this be the meaning, as contended by Sir Robert Finlay, it would still be necessary for the appellants to show that they had jurisdiction to charge the respondents under the powers conferred on them by statute.

The question remains whether a subsequent section of the Act of 1842 or subsequent legislation has given a power to the appellants to charge the respondent to duties contained under Sched. D.

Sect. 108 provides for the charging of duties on profits of foreign or colonial possessions or securities. The Divisional Court construed s. 108 as only applicable to a case in which the taxpayer has exercised an option of sending his statement for assessment to the

H. L. (E.) 1915

KENSINGTON INCOME TAX COMMISSIONERS v. ARAMAYO.

Lord Parmoor.

Commissioners acting respectively for London, Bristol, Liverpool, and Glasgow. The Court of Appeal did not dissent from this view, but based their decision on s. 106. There are later words in the section which appear to direct that the duties on profits from foreign possessions shall be charged by the Commissioners named, and at one place only. Whatever may be the true meaning of s. 108, it gives no jurisdiction to the appellants, and cannot be relied on by them to support their claim to charge the respondent to the duties contained in Sched. D.

The next section on which reliance was placed is s. 110. This section provides that every person having two residences or carrying on any trade or exercising any profession in different parishes, places, or in any place different from the place of his ordinary residence, shall, if required by the respective Commissioners, deliver at each such parish or place the like list, declaration, and statement as he is required to deliver in the parish or place where such person ought to be charged, but shall not be liable to any double charge by reason thereof. It was argued for the appellants that this section would give them jurisdiction to charge the respondent. I think that the section has the contrary meaning and that the obligation to deliver in different parishes or places lists, declarations, or statements is subject to the limitation that there is no liability to be charged in more than one place, such place being where such person ought to be charged under ss. 106 and 108.

Sects. 111—117 relate to assessments made by the additional Commissioners not giving them wider jurisdiction than the General Commissioners in the district in which they act, and by s. 118 an aggrieved person may appeal from any assessment made by the additional Commissioners to the Commissioners for General Purposes in the district where the assessment has been made. The power given by s. 131 to persons chargeable under Sched. D to require the proceedings in order to an assessment to be had and taken before Commissioners for Special Purposes instead of the additional Commissioners does not apply in the present case.

The only remaining section on which reliance was placed is s. 171. This section appears to me to confirm the construction of s. 106 as already stated. It provides that whenever any person who has been assessed, or by any error or mistake is again assessed for the

same cause, and on the same account, and for the same year, he may apply to the Commissioners for General Purposes, acting for the division or place for which he shall have been so assessed by error or mistake, for the purpose of being relieved from such double assessment, and such Commissioners shall, if satisfied, vacate such assessment. This section appears to me to show that the Act only contemplates a second assessment as taking place by error or mistake. It is inconsistent with the contention that a trader may be charged in different places by different Commissioners, whose determination as to the amount might differ in each case. I agree with the construction placed on this section by Pickford L.J.

Reference was further made to ss. 52 and 56 of the Taxes Management Act, 1880, but in my opinion neither of these sections gives any jurisdiction to Commissioners to make a charge to duties under Sched. D. These sections refer to procedure in cases where jurisdiction to charge has already been conferred.

The steps to be followed in this procedure are summarized in Form 2 of the Second Schedule of the Act. The General Commissioners, if satisfied that assessments have been made to charge the properties and persons with the full duty which ought to be charged, sign and allow such assessments, and the assessments so signed and allowed finally determine the amount on which the person chargeable is charged to duties in Sched. D.

My Lords, in my opinion, the appellants had no jurisdiction to charge the respondent to duties under Sched. D, and the appeal should be dismissed with costs.

Order of the Court of Appeal affirmed and appeal dismissed. The appellants to pay the costs in the Courts below and also the costs of the appeal to this House.

Lords' Journals, July 28, 1915.

Solicitor for appellants: *H. Bertram Cox, Solicitor of Inland Revenue.*

Solicitors for respondent: *Dale & Co.*

Applied. TURBURVILLE *v.* WEST HAM CORPN. [1950] 2 All E.R. 54.

[HOUSE OF LORDS.]

H. L. (E.)* 1915 *Nov.* 12.

BRADFORD CORPORATION . . . . . APPELLANTS;

AND

MYERS . . . . . RESPONDENT.

Considered. FIRESTONE TIRE & RUBBER CO. (S.S.) *v.* SINGAPORE HARBOUR BOARD [1952] 2 A.C. 452

Public Authorities' Protection—Limitation of Time for bringing Action—Corporation carrying on Trade under Statutory Powers—Action of Negligence—Statutory Duty or Authority—Private Obligation—Public Authorities Protection Act, 1893 (56 & 57 *Vict. c.* 61), s. 1.

The defendants, a municipal corporation, were authorized by Act of Parliament to carry on the undertaking of a gas company and were bound to supply gas to the inhabitants of the district, and they were also empowered to sell the coke produced in the manufacture of the gas. The defendants contracted to sell and deliver a ton of coke to the plaintiff, and by the negligence of their agent the coke was shot through the plaintiff's shop window. More than six months afterwards the plaintiff commenced an action of negligence against the defendants. The defendants pleaded s. 1 of the Public Authorities Protection Act, 1893, as a bar to the action:—

Held, that the act complained of was not an act done in the direct execution of a statute, or in the discharge of a public duty or the exercise of a public authority, and that the Public Authorities Protection Act, 1893, afforded no defence to the action.

Decision of the Court of Appeal [1915] 1 K. B. 417 affirmed.

APPEAL from a decision of the Court of Appeal (1) reversing a decision of the Divisional Court, which affirmed a decision of the county court judge of Bradford.

The action was brought in the Bradford County Court by the respondent for damages sustained by him by reason of the negligence of the appellants' agent in delivering a load of coke at the respondent's premises, whereby part of the coke was precipitated through a plate-glass window in the respondent's shop. The action was not commenced by the respondent within six months next after the act, neglect, or default complained of. The jury found in favour of the respondent. The appellants set up the statutory defence that

* *Present:* LORD BUCKMASTER L.C., VISCOUNT HALDANE, LORD DUNEDIN, LORD ATKINSON, and LORD SHAW OF DUNFERMLINE.

(1) [1915] 1 K. B. 417.

the action was barred by the Public Authorities Protection Act, 1893. The county court judge decided this point of law in favour of the appellants. In the Divisional Court Bray J. held that the appellants were within the protection of the statute, and Lush J. that they were not, with the result that the appeal was dismissed. This decision was reversed by the Court of Appeal (Buckley, Phillimore, and Pickford L.JJ.), who held that, although the appellants' authority to sell coke was statutory, the act complained of was done in the execution of a voluntary contract and not of any public duty or authority, and therefore the Public Authorities Protection Act, 1893, afforded no defence to the action.

The facts are fully stated in the report of the case in the Court of Appeal and in the judgment of the Lord Chancellor, and they are sufficiently summarized in the head-note to render the arguments intelligible.

1915. July 20, 21. *McCall, K.C.*, and *Ryde, K.C.* (with them *A. V. Mason*), for the appellants. A public authority directed to do a particular act is directed to do everything which is incidental to the doing of that act. The appellants, a municipal corporation, were under a statutory obligation to make gas, which involves the generation of coke, and they were under an implied obligation to dispose of the by-products in the best way for the interests of the ratepayers. It is immaterial that the method of disposition is left to the appellants. If a statute directs the performance of a specific duty and leaves the mode of performance to be selected by the public authority, an act done in working out the selected mode is an act done in the execution of the statutory duty. The neglect complained of in this case occurred in the execution of a statutory duty, and therefore s. 1 of the Public Authorities Protection Act, 1893, applies. For the purposes of this appeal it may be admitted that the Act does not apply to an action for breach of an ordinary contract, such as non-delivery or breach of warranty, but this is an action of negligence. It does not arise out of contract at all, but is founded on tort. It was a mere accident that the respondent had a contract with the appellants; the coke might just as well have been shot through somebody else's window. [They cited *Fielding* v.

H. L. (E.)
1915
BRADFORD CORPORATION v. MYERS.

Morley Corporation (1); *The Ydun* (2); *Midland Ry. Co.* v. *Withington Local Board* (3); *Edwards* v. *Vestry of St. Mary, Islington* (4); *Carpue* v. *London and Brighton Ry. Co.* (5); *Palmer* v. *Grand Junction Ry. Co.* (6); *Chamberlain & Hookham* v. *Bradford Corporation* (7); *Jeremiah Ambler & Sons* v. *Bradford Corporation* (8); *Sharpington* v. *Fulham Guardians* (9); *Lyles* v. *Southend-on-Sea Corporation* (10); *Reid* v. *Blisland School Board* (11); *Bostock* v. *Ramsey Urban District Council* (12); *Selmes* v. *Judge* (13); *Milford Docks Co.* v. *Milford Haven Urban District Council.* (14)]

Scott Fox, K.C., and *Lowenthal*, for the respondent, were not called upon.

The House took time for consideration.

Nov. 12. LORD BUCKMASTER L.C. My Lords, this appeal arises out of circumstances connected with the execution of a simple contract, by which the respondent, on October 10, 1912, bought one ton of coke from the Bradford Corporation, the appellants before your Lordships. On the same day as the order the appellants sent a cart containing the coke for delivery at the respondent's premises. The cart duly arrived, but by a mistake, for which the appellants have been held responsible, the coke was discharged through the respondent's shop window instead of into his cellar. On May 7, 1913, the respondent accordingly brought an action against the appellants, at the county court of Bradford, to recover the sum of 20*l.*, which he said was the damage he had suffered. The jury found that the method of delivery was not due to any act or invitation of the respondent, but to the appellants' negligence, and they assessed the damages at 17*l.* 2*s.* The appellants then raised the contention, of which they had given proper notice on June 10, 1913, that the action could not be maintained because the appellants were, by virtue of the Public Authorities Protection Act of 1893, protected

(1) [1899] 1 Ch. 1; [1900] A. C. 133.
(2) [1899] P. 236, at p. 240.
(3) (1883) 11 Q. B. D. 788.
(4) (1889) 22 Q. B. D. 338.
(5) (1844) 5 Q. B. 747.
(6) (1839) 4 M. & W. 749.
(7) (1901) 83 L. T. 518.
(8) [1902] 2 Ch. 585.
(9) [1904] 2 Ch. 449.
(10) [1905] 2 K. B. 1.
(11) (1901) 17 Times L. R. 626.
(12) [1900] 1 Q. B. 357; [1900] 2 Q. B. 616.
(13) (1871) L. R. 6 Q. B. 724.
(14) (1901) 65 J. P. 483.

against any such suit after the expiration of six months from the date of the occurrence which gave rise to the action. The validity of this defence is the sole subject for consideration by your Lordships.

The learned county court judge decided against the respondent. The Divisional Court differed in opinion, so that the judgment of the county court judge remained. The Court of Appeal have unanimously reversed the judgment of the county court judge, and from their judgment the present appeal has been brought.

The relevant section of the statute is s. 1, the material part of which is in the following terms:—

"Where after the commencement of this Act any action, prosecution, or other proceeding is commenced in the United Kingdom against any person for any act done in pursuance, or execution, or intended execution of any Act of Parliament, or of any public duty or authority, or in respect of any alleged neglect or default in the execution of any such Act, duty, or authority, the following provisions shall have effect:

"(*a*) The action, prosecution, or proceeding shall not lie or be instituted unless it is commenced within six months next after the act, neglect, or default complained of, or, in case of a continuance of injury or damage, within six months next after the ceasing thereof:

"(*b*) Wherever in any such action a judgment is obtained by the defendant, it shall carry costs to be taxed as between solicitor and client."

The appellants urge that they are within the protection of this section, because the sale of coke was a transaction in execution of an Act of Parliament or of a duty or authority cast upon them by the various statutes under which they supply gas to the district. These statutes only need a brief reference. The first in point of date is the Bradford Corporation Gas and Improvement Act of 1871, by which power was given to the corporation to acquire the undertaking of the Bradford Gaslight Company, to carry on the business so acquired, and in particular, by s. 20, to sell and dispose of coke.

The Gasworks Clauses Act of 1871 was passed later in the same year; by this the undertakers of every gas undertaking were compelled to supply gas to the owners or occupiers of premises situated within the defined limits, and to fill up and forward to the local

H. L. (E.) 1915 — BRADFORD CORPORATION v. MYERS. — Lord Buckmaster L.C.

authorities the statement of accounts in the form mentioned in Sched. B of the Act, which included an item on the credit side of the account for the sale of coke. Finally, by an Act of 1873, the provisions of the Gasworks Clauses Act of 1871 were made applicable to the Corporation of Bradford.

The position, therefore, is this: The appellants are authorized by Act of Parliament to carry on the undertaking of a gas company, and they are bound to supply gas to the inhabitants of the district. They also have power to sell coke, though if there were any other use to which it could be put they are not bound to do so, and the accounts which they are directed to furnish contemplate that the coke will be sold in the ordinary way.

Now the act complained of was negligence in breaking the respondent's window, and that arose in the execution of a private obligation which the appellants owed by contract to the respondent, for breach of which no one but the respondent was entitled to complain.

Lush J., who decided in favour of the respondent in the Divisional Court, dealt with the matter entirely upon the footing that these circumstances caused the action to become an action in the nature of an action for breach of contract, and not an action for tort, and relied on cases such as *Sharpington* v. *Fulham Guardians* (1), which have decided that an action for breach of contract is not within the protection of the Act. This reasoning does not appear to me to be convincing, because although it is true that the action could be fashioned in such a manner as to be founded on contract, and instances of such pleas are to be found in the books on pleading, yet in reality the action was an action in tort; and I can see no difference between the right which the respondent had to maintain the suit and that which would have been enjoyed by his next-door neighbour had he suffered similar damage from the same cause.

The difficulty cannot, I think, be resolved by the simple distinction between questions of tort arising out of contract and questions of tort arising independently of contract; but the fact that actions on contract made by the local authorities have been held to be outside the statute shows that the Courts have considered the words of the Act to need careful and strict scrutiny. This, indeed, is apparent both from the purpose and the language of the statute.

(1) [1904] 2 Ch. 449.

Its effect is to limit, as against the general public and in favour of certain persons, the period for bringing actions already fixed by existing statutes, and at the same time to penalize all persons who bring such actions and fail, by making them pay solicitor and client instead of party and party costs.

Now it must be conceded that the Act applies only to a definite class of persons and to a definite class of action. If the section stood alone, and were construed without reference to the introductory words of the statute, it would be wide enough to grant protection to any person who was acting in pursuance of a private Act of Parliament, but on more than one occasion the Courts have pointed out that this cannot be its true interpretation, and that "any person" must be limited so as to apply only to public authorities. The case of *Attorney-General* v. *Company of Proprietors of Margate Pier and Harbour* (1) is an excellent illustration of such a case, and this was expressly approved by Channell J. in *Parker* v. *London County Council.* (2) While the preamble is necessary thus to constrict the meaning of the persons whom the statute is intended to protect, the words of the section themselves limit the class of action, and show that it was not intended to cover every act which a local authority had power to perform.

In other words, it is not because the act out of which an action arises is within their power that a public authority enjoy the benefit of the statute. It is because the act is one which is either an act in the direct execution of a statute, or in the discharge of a public duty, or the exercise of a public authority. I regard these latter words as meaning a duty owed to all the public alike or an authority exercised impartially with regard to all the public. It assumes that there are duties and authorities which are not public, and that in the exercise or discharge of such duties or authorities this protection does not apply.

This distinction is well illustrated by the present case. It may be conceded that the local authority were bound properly to dispose of their residual products; but there was no obligation upon them to dispose by sale, though this was the most obvious and ordinary way. Still less was there any duty to dispose of them to the respondent. No member of the public could have complained if the respondent

(1) [1900] 1 Ch. 749. (2) [1904] 2 K. B. 501.

H. L. (E.) 1915

BRADFORD CORPORATION v. MYERS.

Lord Buckmaster L.C.

had not been supplied; nor had any member of the public the right to require the local authority to contract with him.

The act complained of arose because one of the servants of the appellants, acting in the course of an errand on which they had power to send him, but on which they were not bound in the execution of any Act or in the discharge of any public duty or authority to send him, in breach of his common law duty to his fellow citizens, caused damage by his personal negligence.

In my opinion an action for such negligence is not within the class of action contemplated by the statute.

There have been many authorities to which reference was made in the course of the argument, but, to my mind, there are none that conflict with this view. On the other hand, some of the earlier cases, decided before the passing of the Act and relating to similar, though not identical, conditions contained in other Acts of Parliament, might, I think, be used as an authority for even a more limited construction than that which I have placed upon the statute. The case of *Palmer* v. *Grand Junction Ry. Co.* (1) is just such a case. There the railway company had the power to carry horses, but they were under no obligation to carry them. They received nine horses for the purpose of carriage, and one was killed and three were injured in the course of transit. The section in their special Act of Parliament provided that no action should be brought for anything done or omitted to be done in pursuance of the statute or in execution of the powers and authorities or any of the orders made, given, or directed in reference to or under this Act, unless fourteen days' previous notice in writing should be given.

Parke B., in deciding that this section afforded them no protection in an action brought for damage to the horses, said this: "The Act does not compel them to be common carriers; it only enables them to be so, so far as they shall think fit; and when they have elected to become so, they are liable in that character, in the same way that other common carriers are."

There are also a series of cases, which do not touch the present case, relating to proceedings arising in the course of the direct execution of an Act of Parliament or discharge of their public duties by the local authorities.

(1) 4 M. & W. 749.

The cases of *Edwards* v. *Vestry of St. Mary, Islington* (1), *Parker* v. *London County Council* (2), and *Lyles* v. *Southend-on-Sea Corporation* (3) are all instances of such proceedings.

There are two other cases of a different character which deserve attention because of the importance attached to them by counsel for the appellants. They are the cases of *The Ydun* (4) and *Fielding* v. *Morley Corporation.* (5) The former of these cases was a case where a local authority were acting as the port and harbour authority for the port and harbour of Preston, and were charged with negligence for having in execution of that authority towed a vessel up the river so that she took ground in the channel.

Jeune J., before whom the case came, stated that he saw no distinction between an act done by a local authority as a private trader and an act done in discharge of its public duties and authorities ; but the judgment of the Court of Appeal did not proceed on any such broad basis.

It appears from the judgment of A. L. Smith L.J. that he regarded the local authority as exercising a duty imposed on them by law, and Vaughan Williams L.J. and Romer L.J. both expressed their view that the act complained of was in execution of a statutory duty.

I am not prepared to accept the statement of Jeune J. as an accurate interpretation of the statute. The answer to the illustration he proposes must depend upon the circumstances in which the company is carrying on the trade.

If it is carried on under conditions which enable every member of the public to have the right to trade with the corporation, and to complain if the trade is stopped, then it might be that acts done in connection with such trading would be within the provisions of the Act, but however this may be, there is a great distinction between an incidental power to trade and a direct duty to trade, and the present case falls under the former head.

In the case of *Fielding* v. *Morley Corporation* (5) the corporation had obtained power to add to their waterworks, and it was in the course of executing these powers that the damage arose. In other

(1) 22 Q. B. D. 338.
(2) [1904] 2 K.B. 501.
(3) [1905] 2 K. B. 1.
(4) [1899] P. 256.
(5) [1899] 1 Ch. 1 ; [1900] A. C. 133.

H. L. (E.) 1915

BRADFORD CORPORATION v. MYERS.

Lord Buckmaster L.C.

words, it was in the direct execution of an Act of Parliament that they caused the damage which was the subject of complaint.

In that case in the Court of Appeal counsel argued that there was a distinction between it and the case of *Harrop* v. *Mayor of Ossett* (1), because in the latter case the Ossett Corporation were bound to provide the small-pox hospital, while in the *Morley Case* (2) the water supply was not a positive duty; but this distinction was rejected by Chitty L.J., who obviously regarded the supply of water as just as serious a positive public duty as the supply of the small-pox hospital.

There is nothing in the judgments in these cases that gives further assistance in the present dispute. The difficulty is to draw a line between the class of cases that are within and those that are without the statute, and I am conscious that this opinion does not establish as clear and distinct a line as I should like to see. But the statute itself is so framed that such distinction is not easy, and there may well be cases about which greater doubt may arise and more uncertainty be felt than about the present, which to my mind lies clearly outside the area of statutory protection.

My Lords, my noble and learned friend Lord Dunedin desires me to state that with this opinion he is in entire agreement.

VISCOUNT HALDANE. (3) My Lords, there is an assumption which is sometimes made in construing the language of documents. It is that it must be possible to discover some clear principle or purpose, express or implied, in the words. But it is one thing to say that it is the duty of a Court of construction to endeavour to give a meaning to every word used in the document, and quite another to say that this can always be done, or that a clear principle or purpose can always be determined by exegesis. It is often obvious from the words he has employed that the draftsman has had instructions which have been too vague and insufficient to admit of the expression of a comprehensive principle with exactness, or at all. In such a case the Court can only take the particular facts in the case before it, and decide as best it can whether they come within the words, or whether they fall altogether outside them. The

(1) [1898] 1 Ch. 525. (2) [1899] 1 Ch. 1; [1900] A. C. 133.
(3) Read by the Lord Chancellor.

essentially negative method of the second alternative often renders it, where it applies, the easiest and the safest one to use, and sometimes it admits of a principle of exclusion being laid down where no principle can be formulated affirmatively with any confidence in its legitimacy.

My Lords, s. 1 of the Public Authorities Protection Act, 1893, appears to me to afford an excellent example of language which necessitates this treatment. It yields no precise definition of the kind of act in respect of which protection is given. The word " person " is so used as to make it clear that it does not merely include corporations which owe their existence and powers exclusively to some statute. A natural person or a common law corporation is equally within the section. All that is said is that where proceedings are taken against any sort of person for an act done in pursuance or execution or intended execution of any statute, or of any public duty or authority, or for any neglect or default in the execution of such statute, duty, or authority, the ordinary right of the subject to his remedy is to be cut down by stringent provisions as to time and costs.

My Lords, in the case of such a restriction of ordinary rights I think that the words used must not have more read into them than they express or of necessity imply, and I do not think that they can be properly extended so as to embrace an act which is not done in direct pursuance of the provisions of the statute or in the direct execution of the duty or authority. What causes of action fall within these categories it may be very difficult to say abstractly or exhaustively. It is hardly easier to define a priori the meaning of being done directly than it is to define the number of grains that will make a heap. But just as it is not difficult to tell a heap when it is seen, so it may be easy at least to say of certain acts that they are not the immediate and necessary outcome of duty or authority in a particular case. In *Sharpington* v. *Fulham Guardians* (1) Farwell J. decided that the Act did not apply where in the execution of a public duty the guardians had contracted with a builder to build for them a receiving house for the children of paupers, and the builder was suing them for breach of the particular contract they had entered into. He pointed out that although the general duty made it intra vires to do so, there was no duty to enter

(1) [1904] 2 Ch. 449.

H. L. (E.) 1915 BRADFORD CORPORATION v. MYERS. Viscount Haldane.

into that particular contract. He declined to hold that the mere fact that the contract was within the power of a public body to make rendered the breach anything more than a breach of the private duty to the individual builder arising out of the terms of the contract.

My Lords, I think that Farwell J. was right. For it seems to me that the language of s. 1 does not extend to an act which is done merely incidentally and in the sense that it is the direct result, not of the public duty or authority as such, but of some contract which it may be that such duty or authority put it into the power of a public body to make, but which it need not have made at all. If this be so it is fatal to the contention of the appellants in the present case, and I think that it would have been equally fatal had the action been brought against them by a stranger to the contract who had suffered damage from negligent unloading of the coke in question. For the damage would not have arisen directly from the breach of a public duty, but from a private and separate transaction.

More than I have now said I do not propose to say, for I do not think that an exhaustive attempt at any abstract interpretation of the words would be safe. In *Lyles* v. *Southend-on-Sea Corporation* (1), where a claim by a passenger who was injured while travelling on a municipal tramway was held to fall within the section, the Court of Appeal held that the particular facts were such that in substance the action was not based on a contract, but on the breach of a public duty to carry. This is quite in harmony with the method that seems to me to be the true one in approaching such questions.

I agree that the appeal fails.

LORD ATKINSON. My Lords, the action out of which this appeal has arisen was brought to recover "damages sustained by the plaintiff (the respondent) by reason of the negligence of the defendants (the appellants), their servants or agents, in delivering a load of coke at the plaintiff's premises, 52, Manning Lane, Bradford, on October 10, 1912, whereby part of the coke was precipitated through a large plate-glass window." The action was instituted on May 7, 1913, more than six months after the occurrence complained of. Coke is one of the by-products of the manufacture of coal gas. The appellants had sold this load of coke to the respondent, to be

(1) [1905] 2 K. B. 1.

delivered by them at his premises. Now, negligence is a breach of duty. To give a cause of action the duty must be due from the defendant to the plaintiff. And in my view this case turns upon the nature of the duty owed by the appellants to the respondent for the breach of which the latter sues. Was it a private duty created by the specific contract entered into between the parties for the sale and delivery with reasonable care of this load of coke, or was it a public duty within the meaning of s. 1 of the Public Authorities Protection Act of 1893? The appellants contend that this statute applies, and that, owing to the lapse of time, the action is unsustainable. The county court judge gave judgment for the appellants. On an appeal to the Divisional Court the two learned judges who composed the Court were divided in opinion. On the appeal to the Court of Appeal that Court delivered a unanimous judgment in the respondent's favour. This is the judgment appealed from. By the Bradford Corporation Gas Improvement Act, 1871, the appellants were authorized to purchase, and did in fact purchase, the undertaking of the Bradford Gaslight Company. By s. 2 of that Act the Gas Clauses Act of 1847 was incorporated. By the 20th section the corporation were empowered to "make, store, and supply gas within the borough and within any place within the limits for supply of gas by the company." That is the first member of the section; it then proceeds, "and may sell, manufacture, store, and dispose of coke, coal tar, ... and other matters, the products of the coal or other materials employed in the manufacture of such gas." That is the second member; and the third is that they may sell, let, or deal in gas fittings. These are enabling, not obligatory, provisions. By s. 11 of the incorporated Act, the Gasworks Clauses Act of 1871, however, it is provided that "the undertakers shall on being required so to do by the owner or occupier of any premises situate within twenty-five yards from any main of the undertakers, or such other distance as may be prescribed, give and continue to give a supply of gas for such premises, under such pressure in the main as may be prescribed, and they shall furnish and lay any pipe that may be necessary for such purpose, subject to the conditions following;" Nothing turns upon these conditions.

Here an obligation is by statute cast upon the appellants to supply gas, but there is no provision in any of the Acts to which the House

H. L. (E.) 1915

BRADFORD CORPORATION v. MYERS.

Lord Atkinson.

has been referred imposing expressly a like obligation in reference to any of the by-products of their manufacture. By the 64th section of the Bradford Corporation Act the corporation are bound to apply all the moneys they receive in respect of gas for the sole purposes therein mentioned, the last of which is, "in any manner the corporation may think best for the improvement of the borough and for the public benefit of the inhabitants."

I shall assume that the term "gas" here used covers the by-products of its manufacture. It may well be that under these clauses there would be a duty imposed by law upon the corporation to conduct and manage their undertaking in the way most beneficial to the interest of the inhabitants. If the sale of coke was a reasonably good and proper way of dealing with it for this end, it might well be their duty to sell it. It did not necessarily follow, however, that they were bound to deliver what they sold at the residences of the purchasers, and above all they were under no obligation whatever to sell to any particular individual or to any specified class, or to any member of any class. If the respondent had, before he made his contract, required them to sell to him, they might with impunity have refused to do so. If they had agreed to sell to him but refused to deliver, they could not be compelled to deliver or to agree to deliver. If they had refused to deliver except at the purchaser's risk, they could not be compelled to deliver on any other terms.

One cannot find, therefore, the obligation or duty to deliver with reasonable care, for the breach of which the action is brought, except in the contract made with a particular individual, the respondent. The only duty owed by the appellants to him emerges from that contract, not from the statute. It is a duty owed to one man, not to the public. The negligence of the appellants' servants complained of was not, therefore, a neglect or default in the execution of any "public duty or authority." It was a neglect or default in the discharge of a private duty due to one individual, and arising altogether out of that individual's contract with the public authority. Into this contract both the parties to it were free to enter or to abstain from entering. It was, however, as I understood, argued that the act complained of, the negligent precipitation of this coke through the plaintiff's plate-glass window, could be regarded, and

should be regarded, as an act done by the corporation "in execution or intended execution of an Act of Parliament," inasmuch as the corporation were bound by statute to manufacture gas, that coke was a necessary product of that manufacture, that the corporation were thus bound to produce it, and impliedly bound to get rid of it when produced, and that the sale of it was the most prudent way of disposing of it in the interest of the inhabitants, for whom the corporation were somewhat in the position of trustees.

It may well be that law or equity would hold the corporation bound, in their character of quasi-trustees for the inhabitants, to sell their coke, as the most prudent and profitable way of disposing of it. The plaintiff could not enforce that trust or duty as regards himself, and compel them to sell and deliver coke to him, unless he had a contract with them so to do. And, moreover, though a statute may create a corporation for a certain purpose, statutes somewhat similar to the Public Authorities Protection Act of 1893 have been held not to apply to the breach by such bodies of duties imposed upon them by the common law not by the statute, while if the duties which the common law would of itself impose are also imposed by statute, then statutes such as the Public Authorities Protection Act would apply. The cases of *Palmer* v. *Grand Junction Ry. Co.* (1) and *Carpue* v. *London and Brighton Ry. Co.* (2) are examples of the first class of cases. The case of *Lyles* v. *Southend-on-Sea Corporation* (3) is an example of the second. In the first of the two former the special Act of the company authorized them to act as carriers, entitled them to a notice of action "for any thing done or omitted to be done in pursuance of this Act, or in the execution of the powers and authorities or any of the orders made, given, or directed in, by, or under this Act." And further provided that such an action should be brought within three months after the occurrence.

The action was brought against them as carriers for not safely carrying the plaintiff's horses in their trucks. Parke B. delivered the unanimous judgment of the Court of Exchequer. He said: "If the action was brought against the railway company for the omission of some duty imposed upon them by the Act, this notice

(1) 4 M. & W. 749. (2) 5 Q. B. 747.
(3) [1905] 2 K. B. 1.

H. L. (E.) 1915

BRADFORD CORPORATION v. MYERS.

Lord Atkinson.

would be required. If, for instance, it was founded on a neglect in not duly fencing the railway, on account of which the travelling was more dangerous to those passing along it, assuming that such an obligation resulted from the 180th section, or from the general provisions of the Act, that case would have fallen under the 214th section" (which required notice to be given). "But when the matter is looked at and explained, it appears that the action is not of that nature, but the defendants are sued as common carriers, who have received nine horses for the purpose of being taken to their journey's end, which they have not so delivered, but that on the contrary one was killed and three severely injured, in consequence of an accident on the railroad: the action is brought against them, therefore, in their character of common carriers, and it appears to me that a breach of their duty in that character is not a thing omitted to be done in pursuance of the Act, or in the execution of the powers and authorities given by it. The Act does not compel them to be common carriers; it only enables them to be so, so far as they shall think fit; and when they have elected to become so, they are liable in that character, in the same way as any other common carriers are." On the same principle it may, in the present case, I think, be said that the Act of the appellants does not compel them to become coke merchants. At the most it enables them to be so if they think it prudent, and when they have elected so to be, and have voluntarily contracted to sell and deliver coke to the respondent, they are liable to him to the same extent as any other coke merchant would be who had entered into a similar contract. In the second case, in which the action was brought to recover damages for personal injuries sustained through the negligent management of the train in which the plaintiff was travelling, the judgment of Parke B. was commented on by Lord Denman C.J. and approved of. Notice of action was held for the similar reasons not to be necessary.

In the last of the three cases Vaughan Williams L.J. distinguishes that case from the two former on the very ground that by the 47th section of the Southend Order of 1899, under which the tramway was constructed, it was provided that the railways might be used for conveying passengers, goods, minerals, parcels, and animals, and by the 48th section that the corporation were bound at all times

after the opening of the railway to provide for public traffic such service of cars as might be reasonably required in the public interest, under a penalty for default in complying with the provisions of the clause. The corporation were thus compelled, not merely authorized, to become carriers, and the action was brought against them by the plaintiff, who had paid his fare, in respect of injuries he received while travelling in their car, through the negligence of their servants, whereby the conducting rod was broken and fell upon his head. It was held that the statute of 1893 applied, on the ground that the carrying of passengers on their light railway was something done by the corporation in the execution of the Light Railways Order of 1899, which had the force of a statute, and that they were guilty of neglect in performing their public duty or authority in carrying passengers by their tramway.

Stirling L.J. said (p. 21): "The plaintiff's cause of action does not depend on contract, but arises out of the breach of the duty to carry the plaintiff safely cast upon the defendant corporation by the fact of his being taken as a passenger. . . . . That breach of duty is a 'neglect or default' in the execution of a public duty within the meaning of s. 1 of the Public Authorities Protection Act, 1893."

At p. 13 Vaughan Williams L.J. says: "Now, I do not think that it can have been the intention of the Legislature that every act done by the corporation which was intra vires conferred by this Order should be subject to the protection afforded by this Act. In my judgment an act which is done, not only in pursuance or execution, or intended execution, of this Light Railways Order, but also in pursuance or execution, or intended execution, of some obligation incurred by a public authority voluntarily beyond the obligation cast upon them by the Order, is not an act done in pursuance or execution, or intended execution, of the Order. In the first place, I doubt very much whether an act done by virtue of, and in compliance with, an express contract to do that act is done in pursuance or execution, or intended execution, of the Order merely because the making of the contract only became intra vires by reason of the passing of the Order." The case of *Parker* v. *London County Council* (1) appears at first sight to be irreconcilable with this decision. Channell J. held in that case that the Act of 1893 applied

(1) [1904] 2 K. B. 501.

H. L. (E.) 1915

BRADFORD CORPORATION v. MYERS.

Lord Atkinson

to an action brought against the defendants to recover damages for injuries sustained by a passenger on a tramcar through a collision due to the negligence of their servants. He based his decision on the case of *The Ydun* (1), but in *Selmes* v. *Judge* (2) Blackburn J., speaking of the Act of 5 & 6 Will. 4, c. 50, s. 109, said : " It has long been decided that such a provision as that contained in this section is intended to protect persons from the consequences of committing illegal acts, which are intended to be done under the authority of an Act of Parliament, but which, by some mistake, are not justified by its terms, and cannot be defended by its provisions."

This statement is in strict agreement with the decisions in such earlier authorities as *Greenway* v. *Hurd* (3) and *Waterhouse* v. *Keen.* (4) In both these cases the action was in assumpsit to recover back duties and tolls illegally exacted through a bona fide mistake by a person acting colore officii. In *Midland Ry. Co.* v. *Withington Local Board* (5), which was an action to recover back money paid under the Public Health Act of 1875 in mistake of fact, it was held that s. 150 of that statute applied and notice of action was necessary ; but Brett M.R., as he then was, at p. 794, having stated that he thought an action for money had and received would come within the section, said : " It has been contended that this is an action in contract, and that whenever an action is brought upon contract, the section does not apply. I think that where an action has been brought for something done or omitted to be done under an express contract, the section does not apply ; according to the cases cited an enactment of this kind does not apply to specific contracts. Again, when goods have been sold, and the price is to be paid upon a quantum meruit, the section will not apply to an action for the price, because the refusal or omission to pay would be a failure to comply with the terms of the contract and not with the provisions of the statute. It may be said that this is an implied contract : I think that argument fallacious : no contract was intended to be entered into ; but where money was paid under a mistake of fact, the judges held that under the old forms of procedure it might be recovered back in an action quasi ex contractu. This is not a case where

(1) [1899] P. 236.
(2) L. R. 6 Q. B. 724, at p. 727.
(3) (1792) 4 T. R. 553.
(4) (1825) 4 B. & C. 200.
(5) 11 Q. B. D. 788.

the parties intended to contract without saying so in express terms."

In *Sharpington* v. *Fulham Guardians* (1) the defendants, as guardians of the poor of the Fulham Union, entered into a contract with a builder to do certain work in order to convert an old mansion-house into a receiving house for pauper children. The provision of this receiving house was within the statutory powers and duties of the defendants. The work was completed and the contract price paid. There was some delay in completion, due, as the plaintiff alleged, to the defendants' constant change of plans, &c., subjecting him to greatly increased cost in the execution of the work. He brought an action to recover this increased cost. It was referred to arbitration under an arbitration clause contained in the contract. Before the arbitrator the point was raised that the acts complained of occurred six months before the bringing of the action, and that the Public Authorities Protection Act of 1893 applied. By agreement an action was brought to have this preliminary point decided.

Farwell J. delivered an elaborate and, in my view, a most convincing judgment, in which, after examining all the relevant authorities, he came to the conclusion that the Act did not apply, for the reasons stated in his own words at p. 456 : " The public duty which is here cast upon the guardians is to supply a receiving house for poor children ; a breach or negligent performance of that duty would be an injury to the children, or possibly to the public, who might be injured by finding the children on the highway. In order to carry out this duty they have power to build a house or alter a house, and they accordingly entered into a private contract. It is a breach of this private contract that is complained of in this action. It is not a complaint by a number of children or by a member of the public in respect of the public duty. It is a complaint by a private individual in respect of a private injury done to him. The only way in which the public duty comes in at all is, as I have pointed out, that if it were not for the public duty any such contract would be ultra vires. But that would apply to every contract. I cannot find any ground for saying that this particular contract comes within the Act."

In an earlier portion of his judgment (p. 455) the learned judge

(1) [1904] 2 Ch. 449.

H. L. (E.) 1915

BRADFORD CORPORATION v. MYERS.

Lord Atkinson.

had pointed out that "every contract entered into by a public body is necessarily in a sense entered into in discharge of a public duty or under statutory authority, for otherwise it would be ultra vires." And he adds that if he decided in the defendants' favour it would necessarily follow that every contract entered into by a public authority was an act done in pursuance of a public duty or authority, and, therefore, one to which the Act applied. Every word of that judgment, which, in my view, as in that of the learned Lords Justices in the Court of Appeal, is sound in principle and consistent with authority, is applicable to the present case. I think that the negligent act complained of here was not done in pursuance or execution or intended execution of any Act of Parliament, since there was no statutory obligation on the appellants to do it. I think it was not done in execution or intended execution of any public duty or authority, since no public duty was imposed upon the appellants to deliver this coke. I think the appellants were not guilty of any neglect or default in the execution of any Act of Parliament, or public duty, or authority, since no public duty rested upon them. If the respondent's case be true the appellants were guilty, and only guilty of a neglect, or default, in the discharge of the private duty owed by them to the respondent, which their express contract with him, and that alone, had created and imposed upon them. I am, therefore, of opinion that the Public Authorities Protection Act of 1893 does not apply, that the judgment and decision appealed from were absolutely right and should be upheld, and that this appeal be dismissed with costs here and below.

LORD SHAW OF DUNFERMLINE. My Lords, the sole question in the appeal has reference to the construction of the words of s. 1 of the Public Authorities Protection Act, 1893.

This statute is one of much importance to local authorities throughout the country. By the limitation which it imposes it prevents belated and in many cases unfounded actions. In this way it, pro tanto, allows a safer periodical budget, prevents one generation of ratepayers from being saddled with the obligations of another, and secures steadiness in municipal and local accounting. I accordingly express no surprise at the appeal. Speaking for myself, I much regret that the argument was not heard on both sides. My regret

is deepened by these two further considerations: (1.) It is possible, even from the judgments now being pronounced in this House, to observe the difficulty which surrounds the case and which accompanies the attempt to enunciate a principle of construction for the statutory words employed. (2.) Furthermore, there is a not inconsiderable body of authority on the subject in Scotland, where the Public Authorities Protection Act has been frequently considered. No exposition of these Scotch cases was made; they were not even cited. I cannot but think that they might have been so with advantage, and in a full argument. Whether our loss will lessen the usefulness or weight of the present judgments the future will disclose. It has increased, however, my own sense of difficulty and of the possibility of mischance.

The putting of the question "What is it that this statute did not mean?" does not as a general rule—I speak for myself, and differing from the noble Viscount who has preceded me—appear to me to be a helpful proceeding; it may lead to confusion instead of construction, and at best it is a method and not a principle. I say so, being well aware of its temptations, even as a method. And in all cases, unless the method of exclusion leads by exhaustion to the true inclusive meaning of the actual terms employed, it is without real advantage. I take the interpretation of the actual words as they are found.

The respondent having ordered a ton of coke from the appellants, the carter negligently delivered it through a window instead of into a cellar. It is the damage caused by this neglect which is sued for. The action was commenced more than six months after the neglect; if the statute applies the action is too late.

By the Bradford Corporation Acts, taken in connection with the general gas statutes,—the details and references have been already given by your Lordships—the respondents have the right, and are charged with the duty, of supplying gas to the inhabitants of Bradford. They have also the right, and are given authority to "sell" and "dispose" of "coke."

The limitation of actions under the Public Authorities Protection Act covers "any act done in pursuance, or execution, or intended execution of any Act of Parliament, or of any public duty or authority, or in respect of any alleged neglect or default in the execution

H. L. (E.) 1915

BRADFORD CORPORATION v. MYERS.

Lord Shaw of Dunfermline.

of any such Act, duty, or authority." The pinch of this case, Mr. McCall has cogently urged, lies in the word "authority." Granted that the respondents had not a statutory duty to sell coke, still they had "authority" to do so, and what is here complained of is neglect in doing a thing which is authorized by statute.

I think the appellants' counsel were justified in attaching weight to this word, and that it does extend the ambit of the limitation. But there is another word in the section which must not be left out of view. It is not enough that the neglect occurs in the doing of a thing which is authorized by statute, but the thing done is not every or any thing done but must be something in the execution of a *public* duty or authority, and it is only neglect in the execution of any *such* duty or authority that is covered by the statute. This restriction appears to me to be vital. The Act seems to say :—there are many things which a public authority, clothed, say, with statutory power, may do, which the limitation will not cover ; but when the act or neglect had reference to the execution of their public duty or authority—something founded truly on their statutory powers or their public position—to that, and that only, will the limitation apply. I gather that this is the view taken by my noble and learned friend on the woolsack, and while I concur in his views as a whole, I express my pointed agreement with him on this head.

Notwithstanding certain expressions in the course of judicial opinions which might seem to import doubt, I think that this distinction has been on the whole well observed both south and north of the Tweed. In Scotland the question has been, for instance, more than once tried in connection with the working of tramways by municipal authority acting under statutory powers, the limitation being upheld in the case both of passengers and of non-passengers sustaining damage by neglect in the management or running of the cars ; and such decisions as *Spittal* v. *Glasgow Corporation* (1) are entirely in line with *Lyles* v. *Southend-on-Sea Corporation* (2) and *Parker* v. *London County Council* (3) in the English Courts ; whereas cases such as *McPhie* v. *Corporation of Greenock* (4) and the *City of Edinburgh* v. *George Heriot's Hospital* (5) are decided essentially upon

(1) (1904) 6 F. 828.
(2) [1905] 2 K. B. 1.
(3) [1904] 2 K. B. 501.
(4) (1904) 7 F. 246.
(5) (1900) 7 S. L. T. 371.

the same principle as that applied by Farwell L.J. in *Sharpington* v. *Fulham Guardians*. (1) The judgment of Lord Low in *McPhie* (2) is notable ; and I may be allowed to refer more at length to the case of the *City of Edinburgh* v. *George Heriot's Hospital*. (3)

There the action was for repayment of large sums of money said to have been received by the hospital in excess of their just claims under contracts of feu. The hospital pleaded that if they received over-payments of feu duty they were acting in execution of the statute 6 & 7 Vict. c. 35, and of a scheme approved thereunder by Order in Council. Without deciding whether they were or were not a public authority in the sense of the Protection Act, that very careful judge, Lord Kincairney, put the matter thus :

" I am not prepared to say that there may not have been many acts by the governors of Heriot's Hospital which were done in execution of their statute and scheme, and in regard to which they may, on that account, enjoy the protection of the statute. But I am of opinion that the alleged acts, for remedy of which this action has been brought, were not of that character. The relations between Heriot's Hospital and the magistrates, so far as relating to the sums sued for, were simply the relations of superior and vassal and creditor and debtor, and, in recovering their feu-duties, they were merely using the rights of superior and of creditor, and not any statutory rights ; and if they recovered more than was due, that must have been only through a mistake in regard to their rights as superior and creditor, and not through any miscarriage in the exercise of their statutory powers."

This consideration stated by Lord Kincairney—the consideration of what is the foundation of the relations of parties—forms a good key to the solution of the problem.

And I will venture to add, my Lords, that it will be found that the position, not of the one party, but of both parties, must rest on the same foundation. If there be a duty arising from statute or the exercise of a public function, there is a correlative right similarly arising. A municipal tramway car depends for its existence and conduct on, say, a private and many public Acts, and the corporation in running it is performing a public duty. When a citizen

(1) [1904] 2 Ch. 449. (2) 7 F. 246.
(3) 7 S. L. T. 371.

H. L. (E.) 1915

BRADFORD CORPORATION v. MYERS.

Lord Shaw of Dunfermline.

boards such a car, in one sense he makes, by paying his fare, a contract; but the boarding of the car, the payment of the fare, and the charging of the corporation with the responsibility for safe carriage are all matter of right on the part of the passenger, a public right of carriage which he shares with all his fellow citizens, correlative to the public duty which the corporation owes to all. Similarly, when a municipality, by virtue of private and public statutes, carries on a gas undertaking, the public duty of manufacture and supply finds its correlative in the right of the consumer, a public right which he has in common with all his fellow householders, to supply and to service. In both of these cases, accordingly, the Public Authorities Protection Act applies.

But where the right of the individual cannot be correlated with a statutory or public duty to the individual, the foundation of the relations of parties does not lie in anything but a private bargain which it was open for either the municipality or the individual citizen, consumer, or customer to enter into or to decline. And an action on either side founded on the performance or non-performance of that contract is one to which the Protection Act does not apply, because the appeal, which is made to a Court of law, does not rest on statutory or public duty, but merely on a private and individual bargain.

The same principle applies whether the act complained of arose through breach of contract or through tort. I take no stock of such distinction, for the Act does not; it speaks of "an act done." In numerous cases the one legal denomination and the other may be convertible according to the will and skill of the pleader, and I must record my dissent from all those judicial opinions which have been cited in which such a distinction is treated as having a vital bearing on the question. But where a person not under contract with a corporation—say a neighbour of the respondent to whose premises damage was done by the neglect of the carriers—when such a person suffers damage by the act of the local authority, the question at once arises what was the kind of duty in which the corporation was engaged: was it a public duty or a private duty owing to some individual, and that exactly in the sense already explained? If the former, the Act applies; if the latter, it does not.

Judged by this consideration, the appellants' defence and their appeal must fail.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, November 12, 1915.

Solicitors for appellants : *Cann & Son, for Frederick Stevens, Town Clerk, Bradford.*

Solicitor for respondent : *Edgar Bogue, for Scott, Eames & Mossman, Bradford.*

[PRIVY COUNCIL.]

J. C.* 1915 Dec. 21.

CENTRAL TRUST AND SAFE DEPOSIT COMPANY . . . . . } APPELLANTS;

AND

HARVEY G. SNIDER AND OTHERS . . . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF ONTARIO, APPELLATE DIVISION.

Will—Pecuniary Legacy—Covenant to settle Land—Trust—Satisfaction—Specific Performance—Election.

Under a covenant for value to settle land the equitable interest of the covenantee before conveyance is commensurate only with that which a Court of Equity would decree in granting specific performance.

In 1900 a half-interest in freehold premises in Toronto was conveyed to the owner of the other half-interest by his niece, in consideration of a promise in writing that she should be paid half the net rental during her life, and that after her death a half-interest in the property should be conveyed to her heirs, and that the grantee should so provide by his will. Half the net rental was paid to the niece down to the death of the grantee in 1912. By his will made in 1911 the property in question fell into the residue and the testator bequeathed to his niece thereout a legacy of 20,000 dollars. The evidence showed that this legacy was bequeathed, as the legatee knew, upon the footing that she had relinquished, or would relinquish, any claim upon the property under the agreement of 1900:—

Held, that the testator was not a trustee of a half-interest in the property for his niece, and that she was put to her election between enforcing her claim to a half-interest therein or taking the legacy.

APPEAL from a judgment of the Supreme Court of Ontario, Appellate Division (May 12, 1914), affirming a judgment of Middleton J. at the trial.

The appellants were the executors of the will, dated November 18, 1911, of Thomas A. Snider, deceased, of Cincinnati, in the United States of America, who died on June 17, 1912. The respondent Harvey G. Snider was the Canadian executor of the will. So far as

* *Present:* VISCOUNT HALDANE, LORD PARKER OF WADDINGTON, and LORD SUMNER.

the terms of the will are material, the testator thereby devised all the real estate which he might own in Toronto to his Canadian executor for sale, to discharge the incumbrances thereon, and provided that the balance should form part of his residuary estate, out of which he bequeathed various legacies, including one of 20,000 dollars to his niece Mabel Carleton. At the date of his death the testator was registered owner of certain freehold land and buildings known as 78, Bay Street, Toronto, and owned no other real estate in that city.

The respondent, under circumstances which are fully stated in the judgment of their Lordships, claimed an interest in the above premises.

The two actions out of which the appeal arose were commenced by the appellants and by the respondent the Canadian executor to clear the title of the testator in the premises. The actions raised two questions: (1.) What interest (if any) had Mabel Carleton in the premises; (2.) whether, assuming that she had an interest therein, she was put to her election between retaining that interest and accepting the legacy of 20,000 dollars bequeathed to her by the will. The actions were tried by Middleton J., who held that Mabel Carleton was entitled to a half-interest in the 78, Bay Street property. The learned judge further held that the question of election must be determined from the will itself, and that she was not put to her election.

The Appellate Division (Meredith C.J. and Magee J.A.) dismissed an appeal by the executors and the Canadian executor. The learned judges were of opinion that the effect of the letter of May 9, 1900, referred to in the judgment of their Lordships, was to constitute the testator a trustee of an undivided half-interest in the premises, either for Mabel Carleton for her life and after her death for her heirs, or for her in fee simple, and that no question of election arose.

1915. Dec. 1, 2. *P. O. Lawrence, K.C.*, and *W. J. Elliott*, for the appellants. The testator was registered owner of the premises at his death and they passed under the will. He was not a trustee of a half-interest for Mabel Carleton. The effect of the arrangement with her was that the testator should be owner of the premises and

J. C.
1915
CENTRAL TRUST AND SAFE DEPOSIT COMPANY v. SNIDER.

should have power of disposition over them by his will. Mabel Carleton has no interest, save possibly a right of action for damages, or for specific performance as against volunteers. It is not necessary to invoke the equitable doctrine of election, because this is not the case of a testator attempting to dispose by will of property not belonging to him, but of his leaving his own property in a way contrary to a contract which he had entered into. Parol evidence was admissible to show what property the testator owned in Toronto, and consequently to show that Mabel Carleton had no legal or equitable title in the premises. The evidence shows that Mabel Carleton assented to the variation of the agreement of 1900, or if not it establishes that she knew that the legacy was intended by the testator to be in satisfaction of any claim which she might have under that agreement; under those circumstances she cannot equitably enforce her interest and take the legacy. Her equitable title is no greater than that which would be enforced by specific performance: *Howard* v. *Miller*. (1) The appellants are willing that she should elect.

Armour, K.C., for the respondent Mabel Carleton. The testator was holding a half-interest in the property in trust for Mabel Carleton. Half the net rental was paid to her under the directions of the testator. In any case, the testator having failed to perform the consideration upon which the half-interest was conveyed to him, there arose at his death a resulting trust in favour of the grantee; she became entitled to a reconveyance. The legacy was left to her absolutely and she was not put to her election. To raise a case of election it must appear that the testator intended to dispose of her interest. The presumption is that he did not so intend: *Maddison* v. *Chapman*. (2) The general terms in which the will refers to the Toronto property preclude any question of election: *In re Harris* (3); *Miller* v. *Thurgood* (4), distinguishing *Fitzsimons* v. *Fitzsimons* (5); *In re Bedwell's Settlement* (6); *Henry* v. *Henry*. (7) Evidence dehors the will is not admissible to show that the testator intended to dispose of the respondent's interest: *In re Harris*. (3) The legacy

(1) [1915] A. C. 318.
(2) (1861) 1 J. & H. 470.
(3) [1909] 2 Ch. 206.
(4) (1864) 33 Beav. 496.
(5) (1860) 28 Beav. 417.
(6) (1862) 11 W. R. 161.
(7) (1872) 6 I. R. Eq. 286.

given absolutely cannot be taken as left in satisfaction of the respondent's claim to a reconveyance; the principle of satisfaction in equity only applies to land for land, or money for money: *In re Lawes.* (1) There was no evidence of an accord and satisfaction in law.

P. O. Lawrence, K.C., in reply. The respondent's right, if any, under the agreement was either to recover damages or to obtain specific performance. If the former, the legacy can only be taken in satisfaction of the claim. If the latter, equity would not, under the circumstances, decree specific performance unless she disclaimed the legacy.

Dec. 21. The judgment of their Lordships was delivered by

LORD PARKER OF WADDINGTON. The questions for decision in this case concern the title to certain hereditaments in Toronto, known as 78, Bay Street, and arise under the following circumstances: The late Martin Edward Snider died in the year 1888 intestate. He was at the time of his death the owner of the property in question, which then consisted of about 23 feet of frontage on the west side of Bay Street, with a small half-brick residence erected thereon. He left two children, Thomas E. Snider and the defendant Mabel Carleton, and the property devolved upon them as his co-heirs. After their father's death they went to live with their uncle, Thomas A. Snider, hereinafter referred to as the testator. On September 4, 1899, the testator purchased and took a conveyance of the moiety of the property belonging to Thomas C. Snider. The validity of this transaction is not now in dispute. The testator having thus become entitled to a moiety of the property proceeded to erect thereon a warehouse at a cost of some 10,000 dollars.

On May 15, 1900, the defendant Mabel Carleton by deed conveyed to the testator all her estate and interest, legal or equitable, in the property in question, to hold the same unto and to the use of the testator in fee simple. The consideration expressed in the deed was the nominal consideration of one dollar, of which she acknowledged the receipt. The real consideration was admittedly that expressed in a letter dated May 9, 1900, and written to her by Mr. Irwin, the testator's legal adviser. According to this letter she

(1) (1881) 20 Ch. D. 81.

J. C. 1915

CENTRAL TRUST AND SAFE DEPOSIT COMPANY v. SNIDER.

was to be paid during her life one half of the rents of the property less any disbursements, and after her death one moiety of the property itself was to be conveyed to her heirs. This was to be secured partly by the management of the property being left as theretofore in the hands of her maternal uncle, Frank Hillock, and partly by a will which the testator was to make in her favour.

It is in their Lordships' opinion probable that the last-mentioned transaction was, having regard to the relationship existing between the parties, originally voidable in a Court of Equity. Whether, having regard to what subsequently happened, it still remains voidable is a different matter and one which need not be considered, for no claim has been made to avoid it. On the contrary, the defendant Mabel Carleton claims on the footing that by virtue of the conveyance of May 15, 1900, and in the events which have happened, the testator at his death held the property conveyed in trust for her. Her counter-claim asks for a declaration that this conveyance, though absolute in form, was intended only as a conveyance in trust for her, and the first reason in her case on the present appeal is that, the conveyance having been made in consideration of a promise which was never carried out, there is a resulting trust in her favour. Neither the suggestion of an intention to create a trust nor the suggestion of there being a resulting trust is consistent with a claim to have the conveyance set aside on equitable grounds. It is worth while, however, before proceeding further with the history of the case, to consider both these suggestions.

In their Lordships' opinion, the intention of the parties must be gathered from the conveyance and Mr. Irwin's letter. The intention, as manifested by the conveyance, is clear enough. All the interest of the defendant Mabel Carleton, whether legal or equitable, is intended to pass. The letter contains nothing inconsistent with and a good deal to confirm this. The testator was evidently intended to be put in a position to grant a lease or leases of the property on such terms as he might think desirable, which could not be properly done if the defendant Mabel Carleton remained equitable owner of a moiety of the property. Further, the testator's promise to devise a moiety of the property in her favour is inconsistent with her being intended to remain in equity the owner of such moiety, whether the testator did or did not make such a devise. A contract to devise a

beneficial interest assumes an estate in the person who contracts sufficient to enable the contract to be performed, and it would be contrary to ordinary equitable principles to construe a promise to settle as a present declaration of trust. With great deference, their Lordships think that the trial judge, in holding that the letter created a trust, did not give sufficient weight to these considerations. In their opinion, it is impossible to impute to the parties any intention of creating a trust in praesenti.

The suggestion that there was a resulting trust does not appear to have been dealt with in the Courts below. It is, in their Lordships' opinion, equally untenable. When once the conclusion is arrived at that a grantor intends to part with his whole legal and beneficial interest in favour of another, there can be no resulting trust unless, in the view of a Court of Equity, there be no consideration to support the transaction, or the consideration, if any, entirely fails. It is not alleged that there was no such consideration in the present case. It is suggested that the consideration failed. But how can there be a total failure of a consideration consisting, in part at any rate, of a promise to do something in future? If property be conveyed in consideration of a covenant to pay money, the breach of the covenant to pay does not bring about a failure of consideration. The consideration is the covenant, and failure to observe the covenant results in a right of action at law on the covenant or for its breach, and not in any equitable right based on failure of consideration.

In their Lordships' opinion Meredith C.J. put the matter on a surer ground. There being no question of setting the transaction aside, the only point to be determined is whether, by virtue of the testator's promise to settle the property given in the letter of May 9, 1900, for valuable consideration, the defendant Mabel Carleton became entitled in equity to any and what interest. The learned Chief Justice refers to the case of *Freemoult* v. *Dedire* (1) as having decided that a covenant to settle lands makes the covenantor but a trustee for the parties who would be interested if the covenant were performed, and to a passage in Lewin on Trusts, 12th ed., pp. 160—161, where it is stated that if a person agrees for valuable consideration to settle a specific estate he becomes a

(1) (1718) 1 P. Wms. 428.

J. C.
1915
CENTRAL TRUST AND SAFE DEPOSIT COMPANY v. SNIDER.

trustee of it for the intended objects, and all the consequences of a trust will follow. *Freemoult* v. *Dedire* (1) was undoubtedly a sound decision, and there is little fault to find in the statement in Lewin on Trusts as to the general equitable principle. But it must be remembered that this principle is but the logical consequence of the power of a Court of Equity to grant, and its practice in granting, specific performance of a contract to convey or settle real estate. It is often said that after a contract for the sale of land the vendor is a trustee for the purchaser, and it may be similarly said that a person who covenants for value to settle land is a trustee for the objects in whose favour the settlement is to be made. But it must not be forgotten that in each case it is tacitly assumed that the contract would in a Court of Equity be enforced specifically.

If for some reason equity would not enforce specific performance, or if the right to specific performance has been lost by the subsequent conduct of the party in whose favour specific performance might originally have been granted, the vendor or covenantor either never was, or has ceased to be, a trustee in any sense at all. Their Lordships had to consider this point in the case of *Howard* v. *Miller* (2) in connection with the law as to the registration of titles in the province of British Columbia, and came to the conclusion that, though the purchaser of real estate might before conveyance have an equitable interest capable of registration, such interest was in every case commensurate only with what would be decreed to him by a Court of Equity in specifically performing the contract, and could only be defined by reference to the relief which the Court would give by way of specific performance.

If, therefore, the defendant Mabel Carleton has any interest in the property it can only be because an action would lie for specific performance of the testator's contract to settle the property in her favour. Their Lordships will assume that the contract is one in its nature capable of specific performance as against volunteers under the testator's will—as indeed would appear from the case of *Synge* v. *Synge* (3) –and that the defendant Mabel Carleton is in the present action seeking to have it specifically performed. On this footing two questions arise: First, was the contract varied by

(1) 1 P. Wms. 428. (2) [1915] A. C. 318.
(3) [1894] 1 Q. B. 466.

substituting for the promise to settle the property a promise to leave the defendant Mabel Carleton the legacy of 20,000 dollars which the testator in fact gave her by his will? Secondly, if there was no such variation of the contract, can the defendant Mabel Carleton enforce specific performance without abandoning her interest in this legacy? In considering these questions it is necessary to deal in some detail with what happened after the original promise was made.

It appears that the testator, shortly after the conveyance of May 15, 1900, granted a ten-year lease of the property at an annual rent of 977 dollars, and one half of the rent, less outgoings, was duly paid to the defendant Mabel Carleton. In the year 1904 the warehouse built by the testator was burned down, and the testator thereafter erected on the property a larger warehouse at a cost of 27,000 dollars. This sum was provided partly out of moneys received for insurance, partly by a mortgage of the property for 20,000 dollars, and partly out of the testator's private moneys. On June 26, 1905, the testator granted a lease of the property for ten years at an annual rent of 2632·72 dollars. In the year 1909 the testator, through Frank Hillock, proposed to the defendant Mabel Carleton to modify the arrangement contained in the letter of May 9, 1900, as follows, that is to say, the defendant Mabel Carleton was to be paid 600 dollars a year during his life and he was by his will to give her an annuity of 1200 dollars, with a legacy of 20,000 dollars to her children after her death, she on her part giving up all interest in the property in question. The answer of the defendant Mabel Carleton to these proposals is contained in her letter to Mr. Frank Hillock of May 20, 1909. She refers to the arrangement as to receiving half the rents of the property and complains that she has not even had the 600 dollars now proposed to be paid to her. She insists on this arrangement being adhered to. She says, however, "As to Uncle T. A.'s will, that is all right," and in their Lordships' opinion this can only mean that she is willing to accept the new proposals so far as they relate to the provision of the 1200 dollars annuity and the legacy of 20,000 dollars to her children after her death instead of the interest in the property itself, which was to be secured to her according to the original arrangement by her uncle's will. The letter, therefore, is at most a proposal, and not the

J. C. 1915

CENTRAL TRUST AND SAFE DEPOSIT COMPANY v. SNIDER.

acceptance of an offer so as to constitute a contract modifying the original arrangement.

There the correspondence ends, but it appears that the testator thereafter paid her 600 dollars a year, which amounted approximately to one half the rents of the property, and also made a will bequeathing to her an annuity of 1200 dollars and to her children after her death the sum of 20,000 dollars. The defendant Mabel Carleton discussed these provisions with him, evidently on the footing that they were to be in substitution for her interest in the property after his death. She suggested that there was no reason why the legacy should not be left to her absolutely instead of to her children. There was no reason why anybody but herself should benefit by her father's property. By his last will the testator left her an immediate legacy of 20,000 dollars, but did not leave the property itself, as provided by the letter of May 9, 1900. Under these circumstances their Lordships conclude that the 20,000 dollars was left to her on the footing that she had relinquished or would relinquish her interest in the property itself, and that she knew it was so left, and did nothing to bring home to the testator the fact that she would not accept it on this footing. It would be clearly inequitable to allow a legatee, while insisting on her legal right to the legacy, to appeal to a Court of Equity to complete her title to the property itself.

A person who asks equitable relief must himself be willing to do what is equitable. It follows that, even if the agreement of May 9, 1900, has not been varied by mutual consent, it can only be specifically performed if the defendant Mabel Carleton is willing to disclaim the legacy. The appellants being willing that the defendant Mabel Carleton should take either a moiety of the property itself, subject to the existing mortgage, or the legacy, whichever she may prefer, it is unnecessary to decide whether there was ever any binding agreement for the variation of the original contract.

Under the circumstances their Lordships are of opinion that the appeal succeeds, and that the right order will be to declare that the defendant Mabel Carleton cannot take both the interest in the property, to which the Courts below have declared her to be entitled, and the 20,000 dollars legacy, and to limit a period of three months within which she is to exercise her election.

Their Lordships will humbly advise His Majesty to this effect, and they think that the respondent Mabel Carleton should pay the appellants' costs here and in the Court of Appeal. With regard to the costs here and in the Court of Appeal of the other respondents, they should be paid out of the estate of Thomas A. Snider.

Solicitors for appellants and respondent Harvey G. Snider: *Blake & Redden.*

Solicitors for respondent Mabel Carleton: *Harrison, Powell & Tulk.*

[PRIVY COUNCIL.]

J. C.* 1915 *Dec.* 21.

STEEDMAN . . . . . APPELLANT;

AND

DRINKLE AND ANOTHER . . . . . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF SASKATCHEWAN.

Vendor and Purchaser—Specific Performance—Time of Essence—Default of Purchaser—Forfeiture of Money paid—Penalty—Relief.

By an agreement in writing dated December 9, 1909, land in the province of Saskatchewan was sold for 16,000 dollars, of which 1000 dollars were paid on signing the agreement and the balance was payable by six annual instalments on December 1 of each year. The agreement provided that, if the purchaser should make default in any of the payments, the vendor should be at liberty to cancel the agreement and to retain, as liquidated damages, the payments already made, and that time was to be considered as of the essence of the agreement. Default having been made in the payment of the first instalment, the vendor cancelled the agreement; assignees of the purchaser sued for specific performance:—

Held that, the parties having made time of the essence of the agreement, specific performance could not be decreed, but that the forfeiture of the money paid was a penalty from which relief should be granted on proper terms.

Kilmer v. *British Columbia Orchard Lands* [1913] A. C. 319 explained.

APPEAL from a judgment of the Supreme Court of Saskatchewan en banc (November 15, 1913) reversing the judgment of Newlands J. at the trial (December 5, 1912).

* *Present:* VISCOUNT HALDANE, LORD PARKER OF WADDINGTON, and LORD SUMNER.

J. C.
1915
STEEDMAN
v.
DRINKLE.

The respondents, as assignees of the purchaser, sued in the Supreme Court of Saskatchewan for specific performance of an agreement dated December 9, 1909, for the sale of land in that province. The terms of the agreement and the facts of the case appear from the judgment of their Lordships.

By their statement of claim the respondents asked for (1.) specific performance, or alternatively damages; (2.) in the alternative that they should be relieved from the forfeiture (if any) of their rights and interest under the agreement, and of their equitable rights or interest in the lands, upon terms. The appellant by his defence pleaded that he had exercised his right to cancel the agreement before the respondents had offered to perform the same, and he counterclaimed a declaration that the agreement had been validly determined.

The action was tried by Newlands J., who held that, time being made of the essence, he could not grant the respondents relief against the forfeiture of their interest in the land. He was, however, prepared to allow an amendment of the statement of claim, so as to relieve them against forfeiture of the amount paid. The respondents refused this offer and appealed.

The Supreme Court en banc (the Chief Justice, with Johnstone, Lamont, and Brown JJ.) reversed the above decision, holding upon the authority of *Kilmer* v. *British Columbia Orchard Lands* (1) that the Court had jurisdiction to grant specific performance, which they accordingly decreed upon payment of the amount due to the appellant.

1915. Dec. 7. *Nesbitt, K.C.*, and *A. M. Stewart*, for the appellant. The parties expressly made time of the essence of their agreement. The authorities clearly establish that where that is the case specific performance will not be decreed against an unwilling vendor in favour of a purchaser who has failed to pay at the time stipulated: *Stickney* v. *Keeble*. (2) The Board did not in *Kilmer* v. *British Columbia Orchard Lands* (1) decide to the contrary. The action there was by the vendors, who had been paid part of the price, for a declaration that they were entitled to annul the contract. The Board, following the decision in *In re Dagenham (Thames)*

(1) [1913] A. C. 319. (2) [1915] A. C. 385.

Dock Co. (1), held that the provision for a forfeiture of the money paid was a penalty and could not be enforced. The vendors being held not entitled to retain the money paid were probably willing that the contract should be carried out. In effect the decree was made in that case as a condition to relief being granted. [*Snell* v. *Brickles* (2) was also referred to.]

Sir R. Finlay, K.C., and *The Hon. M. Macnaghten*, for the respondents. This case is not distinguishable from *Kilmer* v. *British Columbia Orchard Lands* (3), in which time was expressly made of the essence of the contract. The purchaser in that case counterclaimed for and obtained a decree for specific performance. The vendors had resold the land to other parties; it cannot therefore be inferred that they assented to a decree. The effect of *Kilmer's Case* (3) is that where a stipulation that time shall be of the essence is part of provisions for forfeiture which amount to a penalty the vendor is not only precluded from enforcing the forfeiture, but cannot rely upon the stipulation as to time in reply to a claim for specific performance. There is nothing in the decision contrary to the principles upon which equity decrees specific performance.

Nesbitt, K.C., replied.

Dec. 21. The judgment of their Lordships was delivered by

VISCOUNT HALDANE. This is an appeal from the Supreme Court of Saskatchewan reversing the judgment of Newlands J., who had dismissed an action for specific performance. The facts were shortly these: James Campbell White agreed by writing, dated December 9, 1909, to sell 160 acres of land in the province to one Loveridge for 16,000 dollars, of which 1000 dollars were paid on signing the agreement, and the balance was payable in annual instalments on December 1 in each year. Loveridge entered into the agreement on behalf of the respondent John C. Drinkle, who, along with one Hair, was the real purchaser. In January, 1910, the interest of Hair under the agreement was acquired by the respondent W. R. Drinkle, and on January 24, 1910, Loveridge assigned the agreement to the respondents. Just before this date White died intestate. On April 18, 1910, letters of administration to his estate

(1) (1873) L. R. 8 Ch. 1022. (2) (1914) 50 Can. S. C. R. 360.
(3) [1913] A. C. 319.

J. C. 1915 STEEDMAN v. DRINKLE.

were granted to Steedman, the appellant, in the province of Ontario, and on May 25, 1911, the grant was resealed in the province of Saskatchewan. On July 22, 1910, the appellant, as administrator, purported to approve the assignment.

The material provisions of the agreement, in addition to those already stated, were that the instalments of purchase-money and interest thereon were payable at Hamilton in the province of Ontario; that the purchaser would cultivate the land in manner specified, and would pay the instalments as they fell due on the days mentioned. It was further provided that on any default the whole of the principal and interest secured by the agreement should at once become due and be payable, or the contract should be forfeited and determined, at the option of the vendor. On payment of the sums of money mentioned, with interest, the vendor was to convey to the purchaser, who was to have possession on the execution of the agreement, the purchaser holding the premises as tenant to the vendor at a yearly rent equivalent to and applicable in satisfaction of the instalments.

It was further agreed that in case the purchaser should make default in any of the payments to be made the vendor should be at liberty, without notice, to cancel the agreement and declare it void, and to retain any payments made on account of it as and by way of liquidated damages, and to retain all improvements made on the premises, or else to proceed to another sale, any deficiency in price, with costs, charges, and expenses, to be borne by the purchaser. In case the vendor thought fit to declare the contract void under these provisions he might make a declaration by notice to the purchaser, addressed to a post office mentioned. It was also provided that time was to be considered as of the essence of the agreement. No assignment was to be valid unless approved by the vendor or his agent.

The first deferred instalment, falling due on December 1, 1910, was not paid. The appellant thereupon, by his solicitors, gave notice cancelling the agreement. The respondent W. R. Drinkle thereupon, on December 21, tendered the amount due, but the appellant declined to receive it and repeated this refusal, whereupon another and formal tender was made a few days later.

The respondents then brought the action in which this appeal

arises, claiming specific performance, and in the alternative relief from forfeiture under the terms of the agreement. Newlands J. thought that the appellant was entitled, under the terms of the agreement providing that time should be of its essence, to cancel it on the default which had been made. He was willing to relieve the respondents from the forfeiture of the amount paid under the agreement. The respondents, however, did not accept this offer, and appealed. The Supreme Court held that the case was governed by the decision of this Board in *Kilmer* v. *British Columbia Orchard Lands* (1), in which it was held on a somewhat similar agreement that the stipulation that payments already made of instalments might, on forfeiture, be retained was really a stipulation for a penalty and should be relieved against. In that case, under the circumstances, specific performance was also granted, notwithstanding a provision that time was to be of the essence. The Supreme Court followed what it believed to have been laid down by this Board, and decreed specific performance in addition to relief from forfeiture.

As to the relief from forfeiture, their Lordships think that the Supreme Court was right in holding, for the reasons assigned in the former decision of this Board, that the stipulation in question was one for a penalty, against which relief should be given on proper terms. But as regards specific performance they are of opinion that the Supreme Court was wrong in reversing the judgment of Newlands J. Courts of Equity, which look at the substance as distinguished from the letter of agreements, no doubt exercise an extensive jurisdiction which enables them to decree specific performance in cases where justice requires it, even though literal terms of stipulations as to time have not been observed. But they never exercise this jurisdiction where the parties have expressly intimated in their agreement that it is not to apply by providing that time is to be of the essence of their bargain. If, indeed, the parties, having originally so provided, have expressly or by implication waived the provision made, the jurisdiction will again attach.

In the case referred to this appears to have been what happened. For *Kilmer* v. *British Columbia Orchard Lands* (1) was an appeal in which the facts were that the company had sold land for a price

(1) [1913] A. C. 319.

J. C.
1915
STEEDMAN
v.
DRINKLE.

to be paid in instalments at specified dates, with a clause of forfeiture, in default of punctual payment, both of all rights under the agreement and of all payments already made. Time was, as in the present case, declared to be of the essence of the agreement. Default in punctual payment having occurred, the company claimed a declaration that the agreement was at an end, and for their strict rights under its terms. Kilmer, who was the purchaser, counterclaimed for specific performance. This Board held that as regards the company's claim the stipulation for forfeiture on which it was founded was in the nature of a penalty, against which relief ought to be granted on terms.

So far the decision, which merely applied a well-known principle, is easy to follow, and in their Lordships' opinion so far it governs the present case. But the Board went on to decree specific performance. As time was declared to be of the essence of the agreement, this could only have been decreed if their Lordships were of opinion that the stipulation as to time had ceased to be applicable. On examining the facts which were before the Board it appears that their Lordships proceeded on the view that this was so. The date of payment of the instalment which was not paid had been extended, so that the stipulation had not been insisted on by the company. The learned counsel who argued the case for the purchaser contended that when the company had submitted to postpone the date of payment they could not any longer insist that time was of the essence. Their Lordships appear to have adopted this view, and on that footing alone to have decreed specific performance as counterclaimed.

In the present case there has been no such agreement to extend time, nor anything that amounts to waiver of the right to treat time as of the essence. While, therefore, the Court below was, in the present case, right in holding that the appellant could not insist on forfeiture in accordance with the strict terms of the agreement, their Lordships are of opinion that there was no justification for decreeing specific performance. They think that the respondents should, even at this late stage, be relieved from forfeiture of the sums paid by them under the agreement as proposed by the learned judge who tried the case. For this purpose the respondents should have liberty to apply to the Court of first instance. For the rest,

the judgment of the Court of Appeal should be reversed, and the claim for specific performance dismissed, the appellant to have his costs here and in the Courts below. Their Lordships will humbly advise His Majesty accordingly.

J. C. 1915 STEEDMAN v. DRINKLE.

Solicitors for appellant: *Blake & Redden.*
Solicitors for respondents: *Stanley Evans & Co.*

[PRIVY COUNCIL.]

UNION INSURANCE SOCIETY OF CANTON, LIMITED . . . . . } APPELLANTS;

AND

GEORGE WILLS & CO. . . . . RESPONDENTS.

J. C.* 1915 *Dec.* 15.

ON APPEAL FROM THE SUPREME COURT OF WESTERN AUSTRALIA.

Western Australia—Marine Insurance—Floating Policy—Declarations—Warranty—Commonwealth Marine Insurance Act (No. 11 of 1909), ss. 35 and 39.

By a contract of marine insurance made in Western Australia and contained in a floating policy the appellants insured all shipments of goods made by the respondents between a large number of ports against the usual marine risks, it being provided as follows: "Declarations of interest to be made to this society's agent at port of shipment where practicable or agent in London or Perth as soon as possible after sailing of vessel to which interest attaches." The respondents sued to recover a total loss of a shipment of goods as to which they had made a declaration, but had not done so as soon as possible after the sailing of the vessel:—

Held, that the provision as to the making of declarations was a promissory warranty within s. 39 of the Commonwealth Marine Insurance Act, 1909 (which reproduces s. 33 of the Marine Insurance Act, 1906), and that the appellants were consequently not liable in respect of the loss.

APPEAL from a judgment of the Supreme Court of Western Australia (July 13, 1914) affirming the judgment of McMillan, acting C.J., at the trial.

* *Present:* VISCOUNT HALDANE, LORD PARMOOR, and LORD WRENBURY.

J. C.
1915
UNION INSURANCE SOCIETY OF CANTON, LIMITED v. GEORGE WILLS & Co.

The respondents, who were merchants carrying on a large business in London and Australia, entered into a contract of marine insurance dated February 28, 1911, with the appellants through the latter's office at Perth in Western Australia.

The contract was in the form of a floating policy or open cover, and provided that the respondents should be insured "in the sum of as may be desired lost or not lost at and from port or ports in the United Kingdom, United States and continent of America, continents of Europe and Asia and elsewhere, to ports in Western Australia, direct or via ports. Also from port or ports in Queensland, New South Wales, Victoria, South Australia, Tasmania and New Zealand, and vice versa, direct or via ports, also from any port in Western Australia to any other port in Western Australia, upon merchandise of every description valued at invoice cost and charges, inclusive of any freight prepaid all plus 10 per cent., to cover all shipments commencing to load at first port of loading on or before 28th February, 1912. Declarations of interest to be made to this society's agent at port of shipment where practicable or agent in London or Perth as soon as possible after sailing of vessel to which interest attaches. In the good ship or vessel called the steamer and/or steamers, sailer and/or sailers." The perils insured against were the usual perils, including fire and perils of the seas. The rates of premium were fixed by a schedule and varied according to the voyage and the class of vessel employed. By indorsed clauses the goods were insured from warehouse to warehouse, the insurance was free from particular average (subject to certain exceptions), and full cargoes were excluded.

The respondents shipped goods in the steamer *Papanui*, which was one of the classes of vessels referred to, at each of her loading ports, namely, Liverpool, Glasgow, Bristol, and London, for Western Australia. The vessel sailed from those ports respectively on July 16, 21, 26, and August 21, 1911. On or about September 12, 1911, while upon her voyage, the *Papanui* was destroyed by fire near St. Helena, and the respondents' goods were totally lost. On September 13, 1911, after receiving news of the loss, the respondents wrote to the appellants' office in London, enclosing a declaration of their interest in shipments by the *Papanui*, valued at 5250*l.*, and explaining that the declaration had been delayed owing to illness and holidays

interfering with their office arrangements. The appellants declined to accept the declaration, and the respondents thereupon commenced an action in the Supreme Court of Western Australia claiming 5280*l.* as for a total loss.

The appellants by their defence alleged a breach in the provision in the policy as to the making of declarations, and pleaded that that provision was a condition or promissory warranty in the policy a breach of which absolved them from liability. In the alternative they counterclaimed for damages for the breach, on the ground that they had thereby been prevented from re-insuring their risk.

The action was tried by McMillan, acting C.J. It was admitted by the respondents at the trial that, in breach of the above mentioned provision, they had not made the declaration as soon as possible, but the appellants did not dispute that the reasons for the delay given in the respondents' letter of September 13, 1911, were true and genuine. It was proved at the trial that there had been as long or longer delay in making declarations upon previous occasions without complaint. Evidence was given on behalf of the appellants that the prompt making of declarations was of importance in order that the insurers might limit their risk by re-insurance, and of their intention to re-insure in the case of the *Papanui*.

The learned judge decided in favour of the respondents; he gave judgment for 5156*l.* and dismissed the counter-claim. This decision was affirmed by the Full Court, consisting of Burnside, acting C.J., with Rooth and Northmore JJ.; the acting Chief Justice, however, was of opinion that the appellants were entitled to succeed upon their counter-claim.

1915. Nov. 22, 23, 24. *Leck, K.C.*, and *Raeburn*, for the appellants. It was admitted at the trial that the declaration was not made as soon as possible. The provision in the contract of insurance as to the making of declarations was a stipulation the performance of which was a condition, either precedent or subsequent, to the appellants' liability. It was a promissory warranty within the meaning of s. 39 of the Commonwealth Marine Insurance Act, 1909, and it is immaterial whether the breach was a cause of the loss. The prompt making of declarations was most material in order that the insurers might know the risk open upon particular lines and,

J. C. 1915 — UNION INSURANCE SOCIETY OF CANTON, LIMITED v. GEORGE WILLS & CO.

if they thought fit, re-insure. [*Behn* v. *Burness* (1); *Thomson* v. *Weems* (2); *Davies* v. *National Fire and Marine Insurance Co. of New Zealand* (3); Commonwealth Marine Insurance Act, 1909, s. 35; and Arnould on Marine Insurance, 8th ed., vol. 1, s. 188, were referred to.]

The Board desired that the counter-claim should stand over for argument if it became material.

Sir R. Finlay, K.C., and *Leslie Scott, K.C.* (with them *Mackinnon, K.C.*), for the respondents. The provision as to the making of declarations was not a promissory warranty; it was not a condition either precedent or subsequent: *Harman* v. *Kingston* (4); *Stoneham* v. *Ocean Railway and General Accident Insurance Co.* (5); Arnould on Marine Insurance, 8th ed., vol. 2, s. 632; Phillips on Insurance, 3rd ed., vol. 1, s. 771. It is not reasonable to suppose that the parties intended that a slight delay, through a bona fide oversight, in declaring a small shipment should invalidate the policy; yet that would be the effect of the appellants' contention. The parties did not regard the prompt making of declarations as of vital importance; in the case of previous shipments a delay as long as that in the present instance had occurred without objection. The language of the stipulation is not that which would ordinarily be used in a policy of marine insurance if it had been intended to be a warranty. In determining whether a particular provision in a policy is intended to be a warranty the chief consideration is whether it is one material to the risk: *Barnard* v. *Faber*. (6) Here all shipments came upon the risk, the insured not being entitled to pick and choose: *Davies* v. *National Fire and Marine Insurance Co. of New Zealand* (3); *Stephens* v. *Australasian Insurance Co.* (7); *Imperial Marine Insurance Co.* v. *Fire Insurance Corporation* (8); delay in making any declaration was therefore not material to the risk. Under s. 35 of the Commonwealth Marine Insurance Act, 1909, the making of declarations is not warranted, since the section provides for rectification of declarations. The intention of the parties was merely to

(1) (1863) 3 B. & S. 751.
(2) (1884) 9 App. Cas. 671.
(3) [1891] A. C. 485.
(4) (1811) 3 Camp. 152.
(5) (1887) 19 Q. B. D. 237.
(6) [1893] 1 K. B. 340.
(7) (1872) L. R. 8 C. P. 18.
(8) (1879) 4 C. P. D. 166.

introduce into the contract the law as codified in that section. Whatever the law may be in Western Australia as to open covers the trial proceeded upon the basis that the contract was a valid floating policy. (1)

Raeburn in reply. The language of the stipulation excludes rectification. The prompt making of declarations was material to the risk in that it would affect the premium charged.

Dec. 15. The judgment of their Lordships was delivered by

LORD PARMOOR. On February 28, 1911, the respondents effected a contract of marine insurance with the appellants, which was issued by their office at Perth in Western Australia. This contract has been treated throughout the proceedings as a policy, and it covered all shipments of merchandise of every description commencing to load at first port of loading on or before February 28, 1912, with the exception of full cargoes, at and from certain specified ports. There are differing rates of premium, but the rate applicable in the present instance was 10*s.* per cent. The policy contains a clause "Declarations of interest to be made to this society's agent at port of shipment where practicable or agent in London or Perth as soon as possible after sailing of vessel to which interest attaches."

The ship *Papanui* sailed from ports Liverpool, Glasgow, Avonmouth, and London, leaving London on August 21, 1911. The respondents loaded cargo at each of these ports. On or about September 12, 1911, the *Papanui* was destroyed by fire at or near St. Helena, and all the respondents' goods were totally lost. The respondents did not forward a declaration of interest as soon as possible after sailing of the vessel, but there is no suggestion of any want of good faith on their part or that the reasons assigned by them for the delay are not genuine. The declaration of interest was forwarded on September 13, 1911, the day after the loss of the vessel.

By their writ issued on February 12, 1912, the respondents claim

(1) See, however, the Commonwealth Marine Insurance Act, 1909, ss. 28, 29, and *Home Marine Insurance Co.* v. *Smith* [1898] 2 Q. B. 351; the revenue requirements in Western Australia as to policies of marine insurance are contained in the Stamp Act, 1882 (46 Vict. No. 6), ss. 67—69, and the schedule to the Stamp Act Amendment Act, 1905 (5 Edw. 7, No. 20).

J. C.
1915
UNION INSURANCE SOCIETY OF CANTON, LIMITED v. GEORGE WILLS & CO.

the sum of 5225*l.* for a loss under the policy. In their defence the appellants plead that the policy contained a condition or promissory warranty that a declaration of interest should be made and that such declaration was not made as soon as possible after the sailing of the steamship *Papanui*. Alternatively they counterclaimed for damages, but this point was not argued before their Lordships, and it is unnecessary to refer further to it. The acting Chief Justice of Western Australia gave judgment in favour of the respondents, and this judgment was affirmed by the Full Court of the Supreme Court of Western Australia on July 13, 1914.

The question to be determined in this appeal is whether the promise by the assured to make a declaration of interest as soon as possible after sailing of the vessel is a warranty, as that word is used and understood in the law of marine insurance, or a collateral stipulation, the breach of which would not avoid the contract, but would only found a right to bring a cross-action, or to counterclaim, for damages. If the promise amounts to a warranty it is immaterial for what purpose the warranty is introduced. The parties had a right to determine for themselves if they desired to introduce a warranty clause as a term of the policy. It has long been established in the common law of England that there is no liability on the insurer unless a warranty is exactly complied with. This principle is made statutory by s. 39 of the Commonwealth Marine Insurance Act, No. 11, 1909, which corresponds with s. 33 of the English Act of 1906. The section enacts that a warranty, as therein defined, is a condition which must be exactly complied with, whether it be material to the risk or not, and that if it be not so complied with, then, subject to any express provision in the policy, the insurer is discharged from his liability as from the date of the breach of warranty, but without prejudice to any liability incurred by him before that date. Sub-ss. 1 and 2 of the same section enact that a warranty, in the following sections, means a promissory warranty, that is to say, a warranty by which the assured undertakes that some particular thing shall or shall not be done, or that some condition shall be fulfilled, or whereby he affirms or negatives the existence of a particular state of facts, and that it may be expressed or implied. This provision does not operate to bring within the category of warranty promises which in the construction of the

contract are not intended by the parties to amount to warranties. In the present policy the assured undertakes to do a particular thing, namely, to make a declaration as soon as possible after the sailing of a vessel, and the question is whether this undertaking amounts to a warranty. An express warranty may be in any form of words from which the intention to warrant can be inferred.

The policy is an open or floating policy under which the liability of the insurers in the first instance attaches before the sailing of the vessel, and therefore at a time before the declaration of interest is due to be made. It was referred to as " a warehouse to warehouse policy," but in any case it is clear that the declaration of interest is not a condition precedent in the sense that a non-compliance therewith vitiates the whole policy ab initio. If, for instance, the merchandise insured had been destroyed by fire in port before the sailing of the vessel, the promise to make a declaration after the sailing of the vessel would not avoid the policy, and the insurers would be liable, if in other respects the conditions of the policy had been complied with. A condition, however, is not the less a warranty because it is a condition subsequent, and unless such a subsequent condition is complied with at the time when its performance is due under the contract, the insurer is discharged from liability as from the date of the breach. Their Lordships have already referred to s. 39, sub-s. 3, of the Commonwealth Marine Insurance Act, No. 11, 1909, which affirms the common law principle that this discharge is without prejudice to any liability incurred by the insurer before that date. This provision does not apply in the present case, since no liability had been incurred before the date at which the declaration of interest was due to be made.

In the present policy the word " warranty " is not used, but their Lordships are of opinion that, on the construction of the contract as a whole, the parties did intend that the promise to make a declaration as soon as possible after sailing of the vessel should be a warranty, and that, in the events that have happened, there is no liability upon the insurers. There is no difficulty in construing the terms of the promise which the assured have made, and there is no question that this promise has not been complied with. The object of the promise is to protect the interests of the insurer. The question arises whether this object is so material to the risk, and has such a material bearing

J. C
1915
UNION INSURANCE SOCIETY OF CANTON, LIMITED v. GEORGE WILLS & Co.

on the bargain, that it forms a substantive condition of the contract, as contrasted with a collateral stipulation for the breach of which damages—if they could be proved—might be claimed by cross-action or by way of counter-claim. If evidence is necessary, the underwriter of the appellants in London, whose evidence was taken on commission, states that the insurers can only arrive at their line of insurances if the declarations of interest are promptly made, and that this information is required to enable insurers to regulate what line they wish to keep, and what amount they may desire to re-insure, and that the amount of line varies very much by particular vessels. It is true that insurers are automatically protected by handing on to other people the excess of liability beyond a certain amount by a class of steamers; but this does not affect their practice of further reducing the amount of their liability in respect of special vessels by effecting special re-insurances. It was suggested that the business might be carried on in some different way which would render the promise to make prompt declarations of less materiality, but the witness denied that the suggestion was practical, and there is no reason for thinking that the business is not carried on according to business experience, so as to avoid, as far as possible, unnecessary risks. It is immaterial to the construction of the contract to consider subsequent events. The intention of the parties must be gathered from the language of the contract, the subject-matter, and the circumstances in existence at the time it was made. It appears to their Lordships that the declaration did directly affect the question of re-insurance, and in this respect was clearly material to the risk and constituted a substantive condition of the contract. It follows that the non-fulfilment of the warranty discharges the insurer from liability as from the date of the breach, and that the insurer is not relegated to such remedy as might be open to him by way of cross-action or counter-claim.

A number of cases were referred to in the course of the argument before their Lordships, but it is only necessary to refer to three of them. It is unnecessary to analyse them in detail, since they mainly depend on the terms of the particular policy on which the litigation has arisen. In *Thomson* v. *Weems* (1) the question arose, on a life policy, whether the policy was void on a warranty. Lord

(1) 9 App. Cas. 671.

Blackburn, in giving his opinion, makes the following general statement of law: "It is competent to the contracting parties, if both agree to it and sufficiently express their intention so to agree, to make the actual existence of anything a condition precedent to the inception of any contract; and if they do so the non-existence of that thing is a good defence. And it is not of any importance whether the existence of that thing was or was not material; the parties would not have made it a part of the contract if they had not thought it material, and they have a right to determine for themselves what they shall deem material. In policies of marine insurance I think it is settled by authority that any statement of a fact bearing upon the risk introduced into the written policy is, by whatever words and in whatever place, to be construed as a warranty, and, prima facie, at least that the compliance with that warranty is a condition precedent to the attaching of the risk."

There is no difference in principle in this respect between a statement of fact and an undertaking that some particular thing shall be done. Their Lordships have already stated their opinion that the promise to make a declaration as soon as possible after sailing of a vessel is a matter bearing upon the risk, and therefore a warranty within the opinion expressed by Lord Blackburn.

Counsel for the respondents referred at some length to the case of *Davies* v. *National Fire and Marine Insurance Co. of New Zealand.* (1) In that case it was held that under the terms of the contract two declarations were necessary, and their Lordships cannot find that it supports in any way the contention put forward on behalf of the respondents.

In the case of *Stephens* v. *Australasian Insurance Co.* (2) it was held that, in accordance with the custom therein stated, and according to the usage of merchants and underwriters as recognized by the Courts without formal proof in each case, a declaration of interest, which it is the right of the assured to make without the consent of the underwriters, may be altered even after the loss is known, if it be altered at a time when it can be, and is altered innocently and without fraud. This principle is now recognized by statute in s. 35, sub-s. 3, of the Commonwealth Marine Insurance Act, No. 11, 1909, and in the corresponding s. 29, sub-s. 3, of the English Act:

(1) [1891] A. C. 485. (2) L. R. 8 C. P. 18.

J. C.
1915
UNION INSURANCE SOCIETY OF CANTON, LIMITED v. GEORGE WILLS & Co.

"Unless the policy otherwise provides, the declarations must be made in order of despatch or shipment. They must, in the case of goods, comprise all consignments within the terms of the policy, and the value of the goods or other property must be honestly stated, but an omission or erroneous declaration may be rectified even after loss or arrival, provided the omission or declaration was made in good faith."

The provision that an omission or erroneous declaration may be rectified even after loss or arrival, provided the omission or declaration has been made in good faith, does not apply to the circumstances which exist in the present appeal. It is not a case of omission or error in a declaration which may be rectified even after loss or arrival if there is good faith, but a case in which no declaration has been made within the terms of the contract. To extend the provision to a case like the present would be in effect to deprive the insurers of the benefits of an express warranty in such cases and to abrogate the principle that the insurers are not liable unless the warranty has been exactly complied with.

Their Lordships will humbly advise His Majesty to allow the appeal with costs here and in the Courts below, and that judgment be entered for the appellants.

Solicitors for appellants: *Sharpe, Pritchard & Co.*
Solicitors for respondents: *Thomas Cooper & Co.*

[HOUSE OF LORDS.]

BARNSLEY BRITISH CO-OPERATIVE SOCIETY, LIMITED . . . . . } Appellants;

AND

WORSBOROUGH URBAN DISTRICT COUNCIL . . . . . } Respondents.

H. L. (E.)*
1915
Oct. 14.

Highway—Extraordinary Traffic—Highways and Locomotives (Amendment) Act, 1878 (41 & 42 *Vict. c.* 77), *s.* 23.

Where traffic is diverted from one road to another the question of the necessity for the diversion is not relevant to the question whether the particular traffic is extraordinary on the latter road within s. 23 of the Highways and Locomotives (Amendment) Act, 1878.

It is immaterial whether the certificate of the surveyor to the road authority required to be given under s. 23 as a condition precedent to the recovery of expenses of extraordinary traffic is given at the sole instance of the surveyor or at the request of the road authority.

A co-operative society having several branch shops, in the ordinary course of its business, conveyed goods to its branch shops by means of wagons drawn by traction engines. The society diverted this traffic from a main road to an alternative road, which was a country road not adapted for heavy traffic, on the ground that the urban district council had, by completely paving the main road with granite setts, rendered it dangerous for traction engine traffic. The council appointed a special committee to consider the damage done to the road in question by the society's traffic. The committee resolved that (subject to a formal written certificate of the council's surveyor) a claim for extraordinary traffic should be made against the society. After the surveyor had signed the certificate the matter was reported to the council, who approved the decision of the committee, and an action was brought against the society to recover extraordinary expenses incurred by the council in repairing the road by reason of the damage caused by extraordinary traffic passing along it by order of the society. The society had constantly used the road in question for nearly two years before the commencement of the period covered by the claim. Rowlatt J. gave judgment for the council:—

Held, (1.) that the requirements of the statute as to the surveyor's certificate had been complied with; (2.) that there was ample

* *Present:* Lord Buckmaster L.C., Earl Loreburn, Lord Atkinson, Lord Parker of Waddington, Lord Sumner, and Lord Parmoor.

H. L. (E.)
1915
BARNSLEY BRITISH CO-OPERATIVE SOCIETY, LIMITED v. WORSBOROUGH URBAN COUNCIL.

evidence to support the finding of the judge that the traffic of the society was extraordinary traffic at the commencement of the period of claim.

Order of the Court of Appeal affirmed.

APPEAL from an order of the Court of Appeal affirming a judgment of Rowlatt J.

The appellants were a co-operative society having their headquarters in Barnsley, Yorkshire, and supplying food, clothing, and other household requisites to the neighbouring towns and villages by means of branch shops. The goods were conveyed by the appellants to their branches in wagons drawn by traction engines.

The respondents were the highway authority for the urban district of Worsborough, which adjoined Barnsley on the south and was one of the districts through which the appellants' traffic passed to their branch shops. In the respondents' district there were two roads known as Vernon Road and Ward Green Road, which together formed one continuous road, a mile and a half long, leading from Barnsley to Worsborough railway crossing. Since 1909 the greater part of the appellants' engines, when engaged in distributing goods to their branches, had passed along these roads. The roads in question were not adapted for heavy traffic, and until the user of the roads by the appellants' traction engines they were used by tradesmen's carts, farm carts, carriages, and the ordinary traffic of a country road, and also by an occasional threshing machine.

In September, 1912, the respondents commenced an action against the appellants under s. 23 of the Highways and Locomotives (Amendment) Act, 1878, for recovery of the sum of 288*l.* 15*s.* 2*d.*, extraordinary expenses alleged to have been incurred by the respondents during a period of eleven months ending August 23, 1912, in repairing the roads in question by reason of the damage caused by excessive weight and extraordinary traffic passing along the said roads by or in consequence of the order of the appellants.

The appellants began using traction engines in the respondents' district thirty years before the commencement of this action, and this user had gradually increased. The Sheffield main road and the roads in question in the action constituted two alternative

routes available to the appellants from Barnsley to Worsborough railway crossing. From 1882 to 1909 the usual route taken by the appellants' engines was by way of the Sheffield main road. From 1886 to 1890 the appellants had used the roads in question, and a claim for extraordinary expenses was made by the respondents against the appellants in respect of such user, and eventually the appellants paid to the respondents a sum of 70*l.* in settlement of their claim.

In 1902 a tramway was laid along the main road, and the space between the tram lines and also a space on each side thereof were paved by granite setts in lieu of macadam. For a short period in 1904, owing to the congestion of the traffic in the main road caused by the laying down of the tram lines, the appellants again used the roads in question in the action, but, on complaint being made by the respondents, they returned to the main road. In the summer of 1909 the respondents paved other portions of the main road, and in particular a portion known as the Cutting, which was upon a steep gradient, with granite setts, so that the whole width of the road was paved. On October 1, 1909, the appellants again began to use the roads in question in the action, on the ground that the paving of the main road had rendered it dangerous for traction engines, and their user of these roads was continuous and extensive. From October 1, 1909, to September 22, 1911, the date immediately preceding the commencement of the period in respect of which the claim was made in the action, the appellants' engines and wagons made 406 journeys each way along these roads, and from September 23, 1911, to August 23, 1912, the period covered by the respondents' claim, the number of journeys was 166. The average total weight per journey of the appellants' traffic was approximately thirty-five tons on the outward journeys and twenty tons on the return journeys.

The first complaint made by the respondents of this traffic was on January 19, 1911. On February 24, 1911, the appellants replied that owing to the action of the respondents in completely paving the main road with granite setts it had been rendered dangerous for traction engines and they had therefore been compelled to take the alternative route. On April 17, 1912, the respondents suggested a meeting with the appellants' directors to discuss the serious

H. L. (E.) 1915

BARNSLEY BRITISH CO-OPERATIVE SOCIETY, LIMITED v. WORSBOROUGH URBAN COUNCIL

condition of some of the roads in the township caused by the appellants' traffic, but the appellants declined this suggestion. On August 12, 1912, the respondents appointed a special committee to deal with the matter. The committee met on August 23, 1912, and resolved that (subject to a formal written certificate of the surveyor being given to date of claim) the clerk of the council should make a claim on the appellants in respect of the damage done to the roads in question, and that, failing payment, he should commence an action against them. An unsigned draft certificate was produced and discussed at the meeting, but the certificate was not signed till August 26, 1912. On August 28 the clerk made a claim against the appellants for expenses. On September 9 the matter was reported to the respondents at a meeting of the council, at which the formal certificate of the surveyor was produced, and the respondents approved the decision of the committee. On September 20 the writ in the action was issued. The appellants by their defence pleaded that the requirements of s. 23 of the Highways and Locomotives (Amendment) Act, 1878, as to the surveyor's certificate had not been complied with, and they denied that they had caused excessive weight or extraordinary traffic to pass along the roads in question. Alternatively they pleaded that the damage and expense arose from the failure of the respondents to keep the Sheffield main road in a state fit to carry the traffic to be expected thereon and from their improperly repairing the said road in such a manner as to make it dangerous for the passage of traction engines.

At the trial of the action they tendered evidence to prove that the paving of the entire width of the main road had rendered it dangerous for traction engine traffic, and that that was the reason why they had transferred their traffic to the roads in question in the action. Rowlatt J. rejected this evidence as irrelevant. The learned judge held (1.) that the production of the surveyor's certificate at the meeting of the respondents on September 9, 1912, was a sufficient compliance with the statute, and (2.) that the traffic complained of was extraordinary traffic and had caused damage to the roads in question; and he gave judgment in favour of the respondents for 150*l*. This decision was affirmed by the Court of Appeal (Lord Reading C.J., Phillimore L.J., and Lush J.).

Oct. 13, 14. *Ernest Charles, K.C.*, and *R. J. Sutcliffe*, for the appellants. 1. Assuming that both routes were open to the appellants, this traffic is not extraordinary. In ascertaining what is extraordinary traffic the time to be looked at is the time immediately preceding the period in respect of which the claim is made: *Hemsworth Rural Council* v. *Micklethwaite*. (1) The test, as laid down by Wills J. in that case, is whether the particular traffic in question has by the usage of trade and of society and by the varying circumstances applicable to the case by that time become such as can fairly be called ordinary traffic. Traffic which is extraordinary to-day may become ordinary to-morrow. This traffic had continued for nearly two years before the commencement of the period of claim, and if it was extraordinary at its inception it has since become ordinary. Extraordinary traffic is traffic which in itself and by reason of its nature is exceptional in character: see per Bowen L.J. in *Hill* v. *Thomas*. (2) [They also referred to *Raglan Highway Board* v. *Monmouth Steam Co.* (3) and *Geirionydd Rural Council* v. *Green*. (4)] The Court of Appeal proceeded upon *Whitebread* v. *Sevenoaks Highway Board* (5), but the stringent rule of law there laid down is not applicable to the changed conditions of the present time. An excessive user of a road in the ordinary conduct of trade does not make the traffic extraordinary traffic, and since the date of that decision traction engine traffic has become so common that it is no longer traffic which prima facie ought to be regarded as extraordinary. At the present day the essential characteristic of the law with regard to the user of the roads is that every member of the public is entitled to use them properly as much as he needs, and traffic will not now be treated as extraordinary, although it be heavy and although it be by traction engine, if it is the ordinary carrying traffic of persons engaged in business in the neighbourhood: *Billericay Rural Council* v. *Poplar Union*. (6)

2. Having regard to the fact that the appellants have been debarred from using the main road by the action of the respondents

(1) (1904) 2 L. G. R. 1084, 1090, 1091.
(2) [1893] 2 Q. B. 333.
(3) (1881) 46 J. P. 598.
(4) [1909] 2 K. B. 845.
(5) [1892] 1 Q. B. 8.
(6) [1911] 2 K. B. 801, 811.

H. L. (E.) 1915

BARNSLEY BRITISH CO-OPERATIVE SOCIETY, LIMITED v. WORSBOROUGH URBAN COUNCIL.

in rendering it impassable for traction engines, this traffic is not extraordinary. The highway authority must make up the public highways in such a way as to keep them in a fit condition to carry the traffic which passes, or which may be expected to pass, along them, and as the ordinary traffic expands or changes its character the nature of the maintenance and repair of the highways must alter to suit the change: *Sharpness New Docks and Gloucester and Birmingham Navigation Co.* v. *Attorney-General.* (1) It follows that if this is traffic which ought to be expected upon the roads in question in this action it is not extraordinary, and when the main road was closed this particular traffic must have been expected on the alternative road. The essential fact in this case is that the appellants by the action of the respondents have been put off one road on to another. The alternative road has become a way of necessity for the appellants. Rowlatt J. was wrong in refusing to consider the appellants' reason for their entry upon the roads complained of.

3. The conditions of the statute as to the surveyor's certificate have not been complied with. This is not a case of the surveyor instructing the council, but of the council instructing the surveyor. It is a case of putting the cart before the horse. The authority must be apprised in the first instance by the surveyor of the damage done to the road. The production of the certificate of the surveyor is a condition precedent to any appeal being made to the section, and this condition is intended to provide a safeguard to the public.

Tindal Atkinson, K.C., and *Joshua Scholefield*, for the respondents.

[LORD BUCKMASTER L.C. Their Lordships do not desire to hear counsel for the respondents upon the question of the surveyor's certificate.]

The question of extraordinary traffic is a simple question of fact. In determining that question it is material to consider what was the ordinary traffic on the roads in question before the appellants' traffic came upon them. It was just the ordinary traffic of a country road. Then is there anything in the special circumstances of this case to render this traffic ordinary traffic? Traffic which is extraordinary at its commencement may in the course of time become ordinary by the gradual development of the traffic on the road, but

(1) [1915] A. C. 654, 665.

the facts of the case do not bring the appellants' traffic within that principle, and this traffic had not ceased to be extraordinary. The learned judge was right in excluding the evidence tendered by the appellants, because the facts tendered in evidence, even if proved, would have afforded no answer to the respondents' claim. The Court is not concerned with the appellants' motives for using the roads in question.

Ernest Charles, K.C., replied.

LORD BUCKMASTER L.C. My Lords, in this case the appellants are the Barnsley British Co-operative Society, against whom Rowlatt J. has entered judgment for the sum of 150*l.* in favour of the respondents, the Worsborough Urban District Council, that sum being the amount he assessed as the damage caused by the appellants owing to their extraordinary use of certain roads within the respondents' district. The Court of Appeal affirmed the judgment of Rowlatt J., and from that judgment the appellants appeal to your Lordships' House. They base their appeal upon two grounds. They say (1.) that the action ought not to have been brought except in accordance with the strict conditions of s. 23 of the Highways and Locomotives (Amendment) Act, 1878, and that those conditions were not complied with; and (2.) that even if all those conditions were satisfied, yet none the less the traffic which was the subject of complaint was not extraordinary, having regard to all the circumstances of the case.

Now the first point appears to have been urged with some determination before Rowlatt J. and the Court of Appeal, but with less resolution before your Lordships. As I understand it, it is this: that s. 23 provides that a claim in respect of excessive damage can only be made where the local authority is moved by a certificate of their surveyor from which it appears that there has been certain damage caused having regard to certain comparisons prescribed by the section. In this case it is said that no such certificate was given to the local authority in the first instance, but that the local authority themselves stimulated the surveyor into making the certificate, and that consequently the exact condition prescribed by the section of the statute has not been satisfied, and that the action ought never to have been entertained.

H. L. (E.) 1915

BARNSLEY BRITISH CO-OPERATIVE SOCIETY, LIMITED v. WORSBOROUGH URBAN COUNCIL.

Lord Buckmaster L.C.

My Lords, the circumstances relating to this argument are to be found by referring to three documents in the appendix to the present case. It appears that a special committee was appointed by the local authority for the purpose of considering the damage caused to these roads, and on August 23, 1912, a meeting of that special committee was held and a resolution was come to that, subject to a formal written certificate of the surveyor, a claim should be made. Accordingly, on August 26 a certificate was given in due course by the surveyor, and it is not stated, and not suggested, that that certificate does not satisfy every one of the conditions of the Act of Parliament, nor is it said that the certificate was not given in perfect honesty and good faith. Following upon the certificate the urban district council themselves met on September 9, received the report of the meeting of the special committee to which I have called your Lordships' attention, and approved the decision of that committee with the result that these proceedings were taken.

I fail to understand in these circumstances how it can be successfully urged that the certificate was not given before the resolution was come to by the respondents that these proceedings should be set on foot, and it appears to me to be immaterial whether the certificate was given at the sole instance of the surveyor or at the request of the council.

Now the proceedings themselves relate to a claim for damage caused by the use of a certain road within the respondents' jurisdiction for the period between September 23, 1911, and August 23, 1912, and in order to consider and do justice to the appellants' arguments it is necessary to investigate a little in detail how it was that that claim arose. It appears that there was a road which is called the Sheffield main road, also within the jurisdiction of the respondents, which was a well-constructed and substantial road occupied by tramway lines along which heavy traffic had for some time before the alteration to which I will refer been in the habit of passing. The appellants themselves in particular, who are a very large co-operative society at Barnsley, used that road frequently for the purpose of conveying their goods to and from their depots and distributing them among their customers by means of a heavy traction engine and two or three trucks following

behind. That traffic had been in the habit of going along this main road, and it may be assumed for the purposes of this case to be traffic which upon that road was not extraordinary traffic. But in 1909 a piece of that road which was on a curve where the road sloped with a heavy incline—a piece that had formerly been macadamized—was covered by the local authority with granite setts, and from that moment the appellants say it became dangerous for the purposes of such a traffic as I have described. Evidence was not accepted by the learned judge who tried the case of this fact—he held that it was irrelevant; but for the purpose of considering the arguments raised by the appellants here I will for the moment assume that the fact could have been established if the evidence had been furnished, and that in those circumstances the appellants were acting wisely and prudently in removing their traffic from the road where it was unsafe to travel to another road by which they could without risk reach their desired terminus. This is the chief circumstance upon which the appellants rely for the purpose of saying that the traffic so transposed and transmitted to this other road was not extraordinary.

Now, my Lords, the road on to which the traffic was transferred is a road which may be described in the words of one of the appellants' own witnesses (I am referring to the evidence of Mr. Silcock) as a road the ordinary traffic of which was town carts and tradesmen's carts and the ordinary traffic of a country road. What this witness says in cross-examination is this. He is asked, "Have you seen the character of the things that use it?"—meaning thereby the traffic that uses the road. His answer is, "Yes." "Q. What are they?—A. The ordinary traffic one sees on such a road. Q. Country carts, are not they?—A. Yes, and town carts as well. Q. Tradesmen's carts?—A. Yes, that is the ordinary traffic of such a road." It is therefore quite plain that before the road was used under the circumstances that I have stated traffic of the description which was put upon it by the appellants would not have been the ordinary traffic of the road; but this is essentially a question of fact, and a question of fact which I think must be determined at the time, and under all the circumstances existing, when the complaint was made. I do not think it is necessary in this case to consider how long the road

H. L. (E.) 1915

BARNSLEY BRITISH CO-OPERATIVE SOCIETY, LIMITED v. WORSBOROUGH URBAN COUNCIL.

Lord Buckmaster L.C.

may be the subject of extraordinary traffic before such extraordinary traffic becomes ordinary. What the learned judge who tried this case himself said with regard to that matter appears to me to be perfectly sound, namely, that extraordinary traffic is not the traffic which is due to the slow and normal increase of the development of traffic owing to the development of the district. But in this case the only previous substantial user of this road by the excessive traffic of which complaint is made, apart from cases where the appellants had used it and had discontinued such user and paid for the damage they had caused, was user which began in October, 1909, and was the subject of complaint in January, 1911. I cannot think that the user during that period can enable the appellants to say that in September of 1911 the traffic which would have been extraordinary in October of 1909 had become ordinary, simply because during that period they had been constantly using the road.

My Lords, my view is, as I have stated, that the question of ordinary and extraordinary traffic, above all questions, is a simple question of fact. The learned judge must determine, having regard to all the circumstances, what was the ordinary traffic of the road, and he must then settle whether or no the traffic complained of was not that ordinary traffic, but was extraordinary traffic which the road was not accustomed to bear. And then, of course, there comes the question whether the extraordinary traffic has caused damage. In determining those questions of fact it appears to me that the motive which influences the person who is charged with making an extraordinary use of the road, in using that road in preference to any other, can have no part at all. He may use it because it is shorter ; he may use it because it is safer ; he may use it because a road he formerly used has become obstructed or for any reason that he pleases, and his user will be perfectly lawful and may be wise; but the reason that leads him to use the road cannot possibly affect the determination of the question of fact, as to whether his user be the ordinary or an extraordinary use of the road.

I am unable to find that the learned judge, who considered this case and gave a long and careful judgment, has in any respect whatever misdirected himself in forming the opinion which he

expressed as to this user complained of having been extraordinary and excessive.

For these reasons, therefore, I think the appeal should fail.

EARL LOREBURN. My Lords, I am of the same opinion and I have a very little to add.

The main point here is, was this ordinary traffic or was it extraordinary traffic on this road and at that time when the complaint arose and the damage was done? That is purely a question of fact. I can understand cases in which it might be properly thought that it was extraordinary by reason of the purpose, or the occasion, or the quality or the quantity, or the method of use. Bowen L.J. gave what is called a definition of what is meant by the Act, but it is not a definition, though it is a valuable commentary which describes, perhaps not exhaustively, some classes of cases which may arise. But just as this House, in the case of the Workmen's Compensation Act, pointed out that the words of the Act are what binds us, so here it is the words of the Act, and not the gloss upon them, that binds us. And precedents are useful to illustrate, but they do not exclude the Act or qualify it. I think, however, that what Bowen L.J. said is very helpful in applying the words of this Act. Still it remains a question of fact. The learned judge has decided it after hearing witnesses, and I think there was ample evidence to justify him in coming to the conclusion at which he arrived.

One more point is made, and that is that the use of this road by these lorries was necessary; it became a via necessitatis because the only alternative road had been shut up. I do not think that is a relevant consideration upon the point of fact whether the traffic was or was not extraordinary. I prefer to say nothing as to whether there might be in this or in other cases a right in law by counterclaim or by action against the authority which made the road impassable. I say nothing about that except that I do not propose to encourage or invite the litigants to take that course in this case.

LORD ATKINSON. My Lords, I concur, and I have nothing to add except this, that it appears to me that if traffic on a particular road be ordinary traffic, and that traffic be diverted to another road by some obstruction or alteration of the surface of the first road, it by

H. L. (E.) 1915

BARNSLEY BRITISH CO-OPERATIVE SOCIETY, LIMITED v. WORSBOROUGH URBAN COUNCIL.

no means follows that by reason of that diversion the traffic should still be treated as ordinary traffic on the road to which it is diverted. I think one must consider the whole circumstances of the diversion, the nature of the road to which it is diverted, the structure of that road, and the traffic that it has hitherto borne.

My Lords, I have nothing to add on the other points which have already been dealt with by my noble and learned friends who have preceded me, but I wish emphatically to state my opinion that the circumstance of the necessity of diversion is really irrelevant.

LORD PARKER OF WADDINGTON. My Lords, I agree and I have nothing very material to add ; but it appears to me to be absolutely indisputable that the question under s. 23 of the Act of 1878, as to whether traffic is ordinary or extraordinary, is entirely a question of fact, and it appears to me to be equally indisputable that, in considering this question of fact, all the circumstances must be taken into account, including in particular the nature of the road along which the traffic has been taken.

Now in the present case the learned judge has decided that the traffic in question was extraordinary traffic, having regard to the nature of the road, and there is undoubtedly quite sufficient evidence to justify a reasonable man in coming to that conclusion. The only objection to his finding taken by counsel appears to be that he excluded certain evidence which was said to be relevant. The persons who were responsible for the traffic in question proposed at the trial to prove that their reason for taking that particular traffic over the road in question was that the main road had been rendered unfit to carry such traffic by the action of the local authority, who were complaining of what had been done. It was, however, alleged that the same argument ought to prevail even if the road had been rendered so unfit, not by the action of the local authority who complained of the traffic in question, but by anybody else. The argument therefore amounts to this, that no traffic on any road can be extraordinary if that is the only road which could possibly be used for the traffic in question. Any such construction of the Act would in effect render the application of the section extremely limited, and in my opinion no such construction can be adopted. The learned judge therefore was right in holding that, even if what was proposed

to be proved had been proved, it could not have been relevant under the circumstances.

My Lords, the only other question to which I desire to refer is the argument based upon what happened between the end of 1909 and the beginning of 1911. The traffic in question was diverted to this road at the end of 1909, and the first complaint with regard to it was at the beginning of 1911. My Lords, I fully agree that there may be circumstances under which continued user of the road for the purpose complained of prior to the date of complaint may make the traffic complained of ordinary traffic; but in the present case I am at a loss to see how the user, which extended a little over one year, can affect the question, more especially as the local authority had in 1905, I think it was, an admission from the persons responsible for the user that the user in question was extraordinary inasmuch as they had already paid for it on complaint of the local authority. In other respects, my Lords, I entirely agree with the judgments which have been already delivered.

LORD SUMNER. My Lords, I have nothing to add. I concur.

LORD PARMOOR. My Lords, I concur.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, October 14, 1915.

Solicitors for appellants : *Joynson-Hicks, Hunt, Moore & Cardew, for Bury & Walkers, Barnsley.*

Solicitors for respondents : *Corbin, Greener & Cook, for Dibb & Clegg, Barnsley.*

[HOUSE OF LORDS.]

H. L. (E.)* 1915 Nov. 5.

STOTT (BALTIC) STEAMERS, LIMITED . . APPELLANTS;

AND

MARTEN AND OTHERS . . . . . RESPONDENTS.

Insurance (Marine)—Time Policy—Perils of the Sea—Institute Time Clauses, clauses 3 and 7.

Whilst a boiler was being lowered by a floating steam crane into the hold of a ship lying in dock, a part of the crane's tackle broke, causing the boiler to fall into the hold of the ship and thereby damaging the hull. The ship was insured under a time policy in the ordinary form with the Institute Time Clauses attached :—

Held, that the loss was not recoverable under the policy, as it was not caused by a peril of the sea or a peril ejusdem generis therewith, and that it was not within clauses 3 or 7 of the Institute Time Clauses, inasmuch as clause 3 did not enlarge the character of the risks insured against by the policy, and the risks specifically mentioned in clause 7 were not extended to matters ejusdem generis by the general words in the body of the policy.

Decision of the Court of Appeal [1914] 3 K. B. 1262 affirmed.

APPEAL from an order of the Court of Appeal (1) affirming a judgment of Pickford J. (2)

The appellants, who were owners of the steamship *Ussa*, had effected a policy of marine insurance upon the steamer. The respondents were underwriters on this policy. The appellants claimed to recover a loss under the policy. The policy was for twelve months from March 16, 1911. The perils insured against were " of the seas . . . . and of all other perils, losses, and misfortunes that have or shall come to the hurt, detriment, or damage of the said . . . . ship, &c., or any part thereof." The policy included " the conditions of the Institute Time Clauses as attached." The Institute Time Clauses provided as follows :—

" 3. In port and at sea, in docks and graving docks, and on ways, gridirons and pontoons, at all times, in all places, and on all occasions, services and trades whatsoever and wheresoever, under steam or

* *Present :* VISCOUNT HALDANE, LORD DUNEDIN, and LORD ATKINSON.

(1) [1914] 3 K. B. 1262. (2) [1914] 1 K. B. 442.

sail, with leave to sail with or without pilots, to tow and assist vessels or craft in all situations, and to be towed and to go on trial trips."

"7. This insurance also specially to cover (subject to the free of average warranty) loss of, or damage to hull or machinery through the negligence of master, mariners, engineers, or pilots, or through explosion, bursting of boilers, breakage of shafts, or through any latent defect in the machinery or hull, provided such loss or damage has not resulted from want of due diligence by the owners of the ship, or any of them, or by the manager, masters, mates, engineers, pilots, or crew not to be considered as part owners within the meaning of this clause should they hold shares in the steamer."

On October 23, 1911, the *Ussa* was lying in the Bramley Moore Dock at Liverpool with her port side along the dock wall. On her starboard side was the floating steam crane *Atlas*, belonging to the Mersey Docks and Harbour Board. The *Atlas* carried a 100-ton crane with a jib reaching 21 feet 6 inches from the ship's side. In the base of the crane was a water ballast tank which operated as a counter-balance. The *Atlas* had conveyed three boilers from the Canada Dock to load them on the *Ussa*. One of these boilers hung on the crane in a sling which was made fast to a shackle. This boiler was lifted and swung over the *Ussa's* side. It was so large that in order to get it through the hatchway and down into the hold of the *Ussa* it had to be tilted. As the boiler was being lowered it caught in the hatch coamings, and the weight being thus taken off the jib of the crane, the counter-balance caused the *Atlas* to list to port. The result was that the jib was lifted, causing the chain fall, which had slackened when the boiler caught in the coaming, to become taut again. The boiler then came free with a jerk and the pin of the shackle holding the sling carried away, with the result that the boiler fell and seriously damaged the hull of the *Ussa*.

Pickford J. held that the loss was not recoverable under the policy and was not within either clause 3 or clause 7 of the Institute Time Clauses, and the Court of Appeal (Buckley, Kennedy, and Phillimore L.JJ.) affirmed his decision.

1915. July 19. *Leslie Scott, K.C.*, and *L. F. C. Darby*, for the appellants. It is not necessary to contend that this accident

H. L. (E.) 1915

STOTT (BALTIC) STEAMERS, LIMITED v. MARTEN.

was a peril of the sea, but it is something ejusdem generis with a peril of the sea. It is not contended that clause 3 of the Institute Time Clauses extends the risks. Clause 7 is an expanding clause. It is to be read as though it were put into the body of the policy, and the general words of the policy "all other perils, &c.," must be imported into it, and upon that construction this is an accident akin to "loss or damage to hull or machinery." A marine insurance policy is a mercantile contract which should be widely interpreted: *M'Cowan* v. *Baine* (1), per Lord Selborne. In *Thames and Mersey Marine Insurance Co.* v. *Hamilton, Fraser & Co.* (the *Inchmaree Case*) (2), which led to the introduction of clause 7 of the Institute Time Clauses, Lord Herschell defines the perils covered by a marine policy as perils to which a marine adventure is exclusively subject or which possess in relation to it a special and peculiar character, and accordingly it was held that an accident caused by the mishandling of a donkey engine was not within the perils insured against, inasmuch as a donkey engine might be used anywhere. Accepting that definition, the appellants contend that the risk of damage to a ship in the course of loading is a peril which possesses in relation to a marine adventure a special and peculiar character, or at any rate where the risk is peculiarly incidental to a ship as such, e.g., arising out of her construction. See per Lord Bramwell in the *Inchmaree Case*. (3) Thus in *Phillips* v. *Barker* (4), where a ship in a graving dock was blown over, the accident was held to be covered by the general words of the policy. It is a characteristic of a ship that she cannot load without considerable danger because of the narrowness of the aperture through which the goods have to pass, just as it is the characteristic of a ship that she cannot stand without support. Further, this was a peril ejusdem generis with perils arising from the navigation of another ship, namely, a waterborne crane, which is one of the perils of the sea.

Adair Roche, K.C., and *F. D. MacKinnon*, for the respondents. In the *Inchmaree Case* (5) Lord Macnaghten says that each case must be governed by its own circumstances. It is said that all risks

(1) [1891] A. C. 401, 403.
(2) (1887) 12 App. Cas. 484, 498.
(3) 12 App. Cas. 492.
(4) (1821) 5 B. & Al. 161.
(5) 12 App. Cas. 502.

ordinarily incidental to the loading of a ship are covered by the general words, but if that is right the result must have been the same if there had been no catching in the coaming at all and the accident had occurred solely through the defect in the pin. Then it is said that the general words cover all accidents due to the peculiar characteristics of a ship. The answer is, on the facts, that this is not such an accident. This was not a risk peculiarly incidental to a ship as such. The breaking of the chain and the catching on the coaming are the only two facts alleged. Then it is sought to treat the *Atlas* as a steamship, but she was simply a machine. Then as to clause 7, it is said that although it is annexed to the policy as a special provision you must read in as an addendum to the clause "all other perils, &c." This is really a provision adding certain special enumerated accidents to the perils insured against, even though they do not fall within the general definition in the policy. It is one thing for underwriters to say that they will be answerable for defects in the machinery of the ship and quite another thing to say that they will be answerable for defects in any one else's machinery brought on to the ship.

Leslie Scott, K.C., replied.

The House took time for consideration.

Nov. 5. VISCOUNT HALDANE. My Lords, I think that the decision of the Court of Appeal was right.

Turning first of all to the well-known language of the policy itself, I am of opinion that it is now settled law that the words of the clause describing the adventures and perils insured against indicate that the scope of this clause is confined to the genus of adventures and perils of the seas, and that the reference to other perils, losses, and misfortunes, with which the clause concludes, is limited to those that are of this genus. Since the judgment of this House in *Thames and Mersey Marine Insurance Co.* v. *Hamilton, Fraser & Co.* (1) I conceive that this point has become a settled one.

Turning next to the Institute Time Clauses incorporated in the policy, I am of opinion that clause 3 makes it clear that the risks in question extend, among other things, to risks in port, but does not

(1) 12 App. Cas. 484.

H. L. (E.) 1915

STOTT (BALTIC) STEAMERS, LIMITED v. MARTEN.

Viscount Haldane.

extend the character or genus of the risks. I am further of opinion that clause 7, known as the "Inchmaree" clause, is not to be read as inserted into or as expanding the description of risks contained in the policy, but is to be regarded simply as a supplemental and independent clause, adding to the risks covered loss or damage to hull or machinery arising out of the negligence of those managing the ship, or from, among other things, breakage of shafts or latent defects. Clause 7 does not in this view enlarge the genus, but simply provides that if this kind of accident happens it is to be covered independently as an addition to the perils described in the policy. The words of clause 7 do not, as I shall presently point out, of themselves cover the case which has occurred, and if I am right they do not alter the construction of the general clause in the policy.

Now what actually happened was that the *Ussa*, the steamer the subject of the policy, was in course of having three boilers loaded into her hold as part of her cargo. These boilers were brought alongside her by means of a steam crane mounted on a mobile floating structure called the *Atlas*, belonging to the Mersey Docks and Harbour Board, and itself a vessel propelled by steam. The boiler which caused the damage was lifted and swung over the *Ussa's* side, and it had to be tilted in order to get it into her hold. As the boiler was being lowered it caught on the hatch coamings, and the weight being thus taken off the jib of the steam crane, a water counter-balance on the other side of the *Atlas* caused her to list away. The result was that the end of the jib of the crane was lifted, the chain fall became taut, the pin of the shackle holding the sling gave, and the boiler fell and damaged the *Ussa*.

My Lords, notwithstanding what was said in argument, I think that the *Atlas* was simply a machine independent of the *Ussa*. It was essentially a crane, and for all that appears to the contrary it might have been used for loading trucks by the riverside as well as for loading ships. It therefore did not, for the purposes of the question before us, differ from a crane on the quay, and it was not under the control of the *Ussa's* crew. What happened while it was being used on the face of it does not fall within the words of clause 7 of the Institute Clauses, and the only question is whether the accident comes under the genus of the other perils described in the policy. Now this genus is limited, as I have already said, to perils of the

seas. No doubt under this policy these include perils of the seas maturing in port. But the accident which occurred was one which might happen in loading a railway truck just as much as in loading a ship, so far as its general character was concerned. I am unable to attach any importance to the nature of the *Atlas*, or to the fact that she sailed about the river and was liable to list by reason of her water-balance. For the present purpose she was, as I have said, a mere machine for loading, and I am of opinion that there is no real analogy between what happened and the infliction of damage by collision or otherwise by one vessel on another at sea. I do not think that the accident which occurred arose out of a peril of the seas within the meaning of the policy.

I therefore move that the appeal be dismissed with costs.

LORD ATKINSON. My Lords, this is an appeal from a judgment of the Court of Appeal, dated July 29, 1914, dismissing an appeal from the judgment of Pickford J., dated November 13, 1913, in favour of the respondents, the defendants in an action brought by the appellants against them to recover, in respect of a loss under a certain time policy effected on the steamship *Ussa*, for twelve months from March 16, 1911.

The appellants are the owners of the steamship *Ussa*. The respondents are underwriters at Lloyd's. During the currency of the policy the *Ussa* was being loaded in dock at Liverpool. Part of her cargo was a large boiler longer than her hatchways. This boiler was carried alongside the *Ussa* by a vessel called the *Atlas*. The two vessels were placed alongside each other starboard to starboard. By means of a crane erected on the *Atlas* the boiler was lifted, swung over the side of the *Ussa*, and was being lowered into her hold through one of her hatchways. The chain, or fall as it is called, of the crane was fixed and prevented from running out by a pin fixed in a shackle of the chain. The boiler caught in the hatch coamings. The strain on the chain being thus lessened, the movement of the water in the automatic counter-balance caused the *Atlas* to list to port away from the *Ussa*. The boiler came free with a jerk, the pin of the shackle was carried away, and the boiler fell into the hold, injuring the ship. It was found as a fact that the water in the dock was not agitated.

H. L. (E.) 1915

STOTT (BALTIC) STEAMERS, LIMITED v. MARTEN.

Lord Atkinson.

The clause in the policy was of the usual kind, insuring the ship against perils of the seas, men-of-war, fire, enemies, pirates, rovers, thieves, &c., &c., and "all other perils, losses, and misfortunes that have or shall come to the hurt, detriment, or damage of the goods, merchandise, or ship." And there was a provision that the policy should include the conditions of the Institute Time Clauses attached. The seventh of these latter is the only one of importance. It runs thus:

"7. This insurance also specially to cover (subject to the free of average warranty) loss of, or damage to hull or machinery through the negligence of master, mariners, engineers, or pilots, or through explosion, bursting of boilers, breakage of shafts, or through any latent defect in the machinery or hull, provided such loss or damage has not resulted from want of due diligence by the owners of the ship, or any of them, or by the manager, masters, mates, engineers, pilots, or crew not to be considered as part owners within the meaning of this clause should they hold shares in the steamer."

This condition is styled the "Inchmaree" clause or condition. It was admittedly specially introduced after the decision of this House in the case of *Thames and Mersey Marine Insurance Co.* v. *Hamilton, Fraser & Co.* (1) to cover injuries not caused by perils of the sea, properly so called, or covered by the general words of such policies covering perils akin to, or resembling, or of the same kind as perils of the sea. Mr. Leslie Scott contended that the policy of insurance should be read and construed as if this seventh condition had been inserted in the body of the policy before the general words, so that in effect the policy should be held to cover not only the risks ejusdem generis as those specifically mentioned in the body of the policy itself, but also risks ejusdem generis as those mentioned in the seventh condition.

In my view that is wholly illegitimate. This seventh clause is merely an addendum to the policy covering risks not covered by the policy as it stood, and cannot by adding to it general words such as are found in the policy itself expand it. Putting the seventh clause aside, there remains the question, Is the accident which caused injury to the ship a peril of the seas or a peril ejusdem generis

(1) 12 App. Cas. 484.

as perils of the seas? That it is not a peril of the seas properly so called is admitted. So, then, the question is this, Is it one of the same genus of perils of which true perils of the seas are species? A peril whose only connection with the sea is that it arises on board ship is not necessarily a peril of the seas nor a peril ejusdem generis as a peril of the sea. The breaking of the chain of a crane, or of a shackle of that chain, if overloaded or subjected to too severe a strain, is not more maritime in character when it occurs on board a ship than when it occurs on land. Nor is the catching the ends of a lengthy boiler on the coamings when being lowered into the hold of a ship through a hatchway more maritime in its character than would be the catching on land of any piece of machinery on the sides of an opening shorter than itself through which it was being lowered. Neither the winds nor the waves contributed to this accident. Nor did the fact that the ship on which it occurred was waterborne. The listing of the *Atlas* to port tended to take up the slack of the chain and to diminish the extent of the drop, and therefore of the strain, when the boiler got free, rather than the contrary. The statement of Lord Ellenborough in *Cullen* v. *Butler* (1) as to the proper construction of general words, such as those used in the present case, in a policy of marine insurance has been many times approved of. He said due effect would be given to them by "allowing them to comprehend and cover other cases of marine damage of the like kind with those which are specially enumerated and occasioned by similar causes." By the words "marine damage" Lord Herschell, in *Thames and Mersey Marine Insurance Co.* v. *Hamilton, Fraser & Co.* (2), took Lord Ellenborough to have meant not only damage caused by the sea, but damage of a character to which a marine adventure is subject.

In my view the present case is covered by this last-mentioned case. The operation which the working of the donkey-engine in that case was designed to effect was, no doubt, a preparation for the sailing of the ship, namely, the filling of her boilers with water, but the accident arose from the outlet for the water pumped up by the pump which the engine worked being closed, with the result that the air chamber of the pump gave way under the excessive pressure of the water which could not escape, and it was held, on the principle

(1) (1816) 5 M. & S. 461, 465. (2) 12 App. Cas. 498.

H. L. (E.) 1915 — STOTT (BALTIC) STEAMERS, LIMITED v. MARTEN. — Lord Atkinson.

laid down by Lord Ellenborough, that it was impossible to say that this damage, the bursting of the air chamber, was occasioned by a "cause" similar to perils of the sea. The loading of a ship with her cargo is no doubt in one sense a preparation for her sailing. It is certainly not so directly connected with her sailing as was the pumping of water into the boilers of a steamship, but unless the accident which occurs in the course of those preparatory operations be occasioned by a cause similar to perils of the sea it is not covered by such a policy as this. Well, it seems to me quite as impossible, in this case, to say that the breaking of the crane chain or the pin of one of its shackles was occasioned by a cause similar to the perils of the sea as it was in the last cited authority to say that the bursting of the air chamber of the donkey-engine pump was occasioned by a cause similar to a peril of the sea. The two cases are really in principle on all fours. I am therefore of opinion that the judgment appealed from was right and should be affirmed, and this appeal be dismissed with costs here and below.

LORD DUNEDIN. (1) My Lords, I concur. I think this case is practically settled by what was decided by this House in the case of *Thames and Mersey Marine Insurance Co.* v. *Hamilton, Fraser & Co.* (2)

I need not quote the words of the policy, which, apart from the Institute Time Clauses, in that case and in this are in common form. In both cases it was admitted that what had happened did not fall under the words which enumerate certain specific perils, but reliance was placed on the general words—all other perils, losses, and misfortunes.

Now the *Thames Case* (2) decided, first, that these general words must be restricted to meaning perils and losses ejusdem generis as perilsof the sea or the other enumerated perils, and, second, that it did not make a peril ejusdem generis because it was in connection with something which was being done and was necessarily being done for the prosecution of a voyage.

In that case the donkey-engine, which had been split, was being used to fill the boilers. Without filled boilers the vessel could not proceed on her voyage, and Lord Halsbury puts the point quite

(1) Read by Lord Sumner. (2) 12 App. Cas. 484.

plainly when he says (1): "On the one side it is said that filling the boiler was necessary to enable the ship to prosecute her voyage; on the other it is said that the accident, peril, or misfortune had nothing to do with the sea and was in no sense of the like kind with any of the perils or misfortunes specifically enumerated."

That seems to me to dispose of what the learned counsel called his wider proposition, namely, that all accidents in loading are covered. Loading is a necessary preliminary to the voyage of a freighted ship; but so is the filling of the boiler. In both cases you have to look further and see whether the accident itself had, as Lord Halsbury put it, "anything to do with the sea."

Now the accident here was that a heavy thing was dropped by a loading crane, partly owing to the pin of a shackle being insufficiently strong, and partly because, owing to the load catching on the coamings of the hatchway, a strain was relaxed and then suddenly put on again with a jerk. As to the pin, obviously no point could be made, but the learned counsel rested what he called his narrower proposition upon the idea that you imparted what one may call a marine character to the accident by saying that hatchways are narrow. Now an aperture is small or not, according as to whether the thing you want to put into it is big or not; and precisely the same difficulty as arose here might and does arise with putting any unwieldy and heavy object into a railway truck. I cannot therefore accede to the smaller proposition; and the fact that the crane itself was waterborne can have nothing to do with it, because that fact had nothing to do with the cause of the accident.

There remains an argument which was founded on clause 7 of the Institute Time Clauses. That clause adds certain specific causes of loss or accident for which the underwriters make themselves responsible. They may be generally described as causes of loss or accident which are to be found in defects of the ship itself or machinery therein. This clause has no general words attached. To make it available the appellant has first to say that as it is an addition to the enumerated perils clause it must be read as embodied in that clause, and thus get the benefit of the general words attached to that clause; and, secondly, that the cause of loss here is ejusdem generis as the causes of loss described therein. I think this argument fails

(1) 12 App. Cas. 490.

H. L. (E.) 1915 STOTT (BALTIC) STEAMERS, LIMITED v. MARTEN. Lord Dunedin.

in both branches. I think the new clause comes in its own place, and must have had general words attached to it if such general words were intended to be added; and, further, I think that the breakage of machinery belonging to and introduced by other people is not ejusdem generis as the breakage of machinery forming part of the ship.

For these reasons I am of opinion that the appeal should be dismissed.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, November 5, 1915.

Solicitors for appellants: *Lightbound, Owen & Co.*
Solicitors for respondents: *William A. Crump & Son.*

[HOUSE OF LORDS.]

H. L. (E.)* 1915 Nov. 15.

PRODUCE BROKERS COMPANY, LIMITED Appellants;

AND

OLYMPIA OIL AND CAKE COMPANY, LIMITED . . . . . Respondents.

Arbitration Clause—Sale of Goods—Dispute arising out of the Contract—Custom affecting Rights and Liabilities under the Contract—Jurisdiction of Arbitrator to determine Existence of Custom.

Under a clause in a contract referring to arbitration any dispute arising under the contract it is competent to the arbitrator finally to determine the existence of a custom affecting the rights and obligations of the parties under the contract, where such custom is not inconsistent with the terms of the contract.

Hutcheson & Co. v. *Eaton & Son* (1884) 13 Q. B. D. 861 and *In re North Western Rubber Co. and Hüttenbach & Co.* [1908] 2 K. B. 907 overruled.

* *Present:* Earl Loreburn, Lord Atkinson, Lord Parker of Waddington, Lord Sumner, and Lord Parmoor.

Decision of the Court of Appeal (given solely on the authority of the above-named cases and without approving them) reversed.

APPEAL from an order of the Court of Appeal affirming an order of the Divisional Court.

The substantial question raised by the appeal was as to the competence of arbitrators, under an arbitration clause in a commercial contract referring all disputes arising out of the contract to arbitration, to decide as to the existence of a custom affecting the rights and obligations of the parties under the contract.

By a contract dated May 30, 1912, the appellants agreed to sell and deliver to the respondents 6000 tons of Soya beans to be shipped from an Eastern port during December, 1912, or January, 1913, to Hull at the price of 7*l.* 18*s.* 9*d.* per ton per ship. The contract, which was on one of the printed forms issued by the Incorporated Oil Seed Association, further provided as follows :—

" 3. Particulars of shipment . . . . to be declared by original sellers not later than forty days from the date of bill of lading. . . . . In case of resales copy of original appropriation shall be accepted by buyers and " (which was admitted to be a misprint for " if ") " passed on without delay."

" 10. This contract is to be void as regards any portion shipped that may not arrive by the ship or ships declared against this contract . . . ."

" 13. All disputes from time to time arising out of this contract including any question of law appearing in the proceedings . . . . shall be referred to arbitration according to the rules endorsed on this contract. . . . ."

By these rules it was provided that the reference should be to two arbitrators, one to be appointed by each party, and an umpire, whose decision in case of disagreement should be final, and that in case either party should be dissatisfied with the award an appeal should lie to the Committee of Appeal of the Incorporated Oil Seed Association.

And the clause contained the following provision :—

" Neither buyers sellers trustee in bankruptcy nor any other person claiming under either of them shall bring any action against

H. L. (E.) 1915 PRODUCE BROKERS COMPANY, LIMITED v. OLYMPIA OIL AND CAKE COMPANY, LIMITED.

the other of them in respect of any such dispute until such dispute has been settled by the arbitrators, umpire, or Committee or Board of Appeal as the case may be and it is expressly agreed that the obtaining an award from either tribunal as the case may be shall be a condition precedent to the right of either contracting party to take any legal proceedings against the other in respect of any claim arising out of this contract."

By a contract in similar terms and upon the same form dated September 9, 1912, the appellants bought 6000 tons of Soya beans from the East Asiatic Company, Limited, in order to fulfil their contract of May 30, 1912, with the respondents.

By a letter dated January 24, 1913, the appellants informed the respondents that in respect of the contract of May 30, 1912, " we have not yet received a tender " (i.e., from the shippers who were the sellers to the appellants), " but we rather imagine same will be the *Canterbury*."

On January 29, 1913, the appellants bought 6000 tons of Soya beans December–January shipment from the respondents, and in a letter of that date confirming the purchase they wrote: " We shall put this against our sale to you of 30th May, 1912, and if we receive no tender we shall guarantee settlement on the mean quantity 6000 tons."

On February 4, 1913, the appellants received from the East Asiatic Company a letter stating that in fulfilment of their contract of September 9, 1912, they tendered a cargo shipped by the *Canterbury*, which, according to telegraphic advice, left Vladivostok on January 31. On the same day, February 4, 1913, the appellants wrote to the respondents a letter quoting (as being what " shippers write ") the above letter of the East Asiatic Company and so tendering the *Canterbury* cargo to the respondents under their contract of May 30, 1912.

In fact on the evening of February 3, 1913, the *Canterbury* had met with disaster near Vladivostok, and on February 4 sank with her cargo. News of her loss was known in London about 3 P.M. on February 4. It was not known to the East Asiatic Company when they wrote their letter to the appellants, but became known to the appellants in the very brief period that elapsed before they handed on the tender to the respondents.

A dispute thereupon arose between the appellants and the respondents. The respondents contended that as the *Canterbury* was lost the appellants' tender of February 4 was bad, and that the appellants must either tender another shipment (and there was in fact no other available) or else pay damages for breach of contract. Such damages would amount to about 1800*l*. The appellants contended that under the contract of May 30, 1912, the tender of the *Canterbury* was good, but that the loss of the vessel and her cargo rendered the contract void.

This dispute was referred to arbitration, and on May 19, 1913, the umpire, Mr. Berthold Pinner, made an award in favour of the appellants that the *Canterbury* appropriation was good and must be accepted by the respondents.

The respondents appealed from this award to the Committee of Appeal of the Oil Seed Association, and certain members of the committee were elected to hear the appeal. At the request of the respondents the Board of Appeal stated a case for the opinion of the Court on certain questions of law arising in the course of the reference. In substance the questions of law submitted for the opinion of the Court were whether, regard being had to the terms of the contract of May 30, 1912, a tender or appropriation under clause 3 could properly be made if at the material time, and whether to the knowledge of the appellants or not, the vessel and her cargo had already become a total loss, and whether the appellants were relieved from every obligation to the respondents under the contract by tendering the cargo shipped by the *Canterbury*.

The Divisional Court (Avory, Rowlatt, and Shearman JJ.) decided that the tender or appropriation was invalid, and that the appellants were not relieved from their obligations to the respondents under the contract by tendering the said cargo. (1)

The matter then went back to the Board of Appeal of the association. By their award made on June 25, 1914, they stated that though they unreservedly accepted the answers of the Court upon the construction of the contract as a matter of law, apart from the custom of the trade, yet they nevertheless found that by the long established and well-recognized custom of the trade under this form of contract the respondents were bound to accept the tender by

(1) [1915] 1 K. B. 233.

H. L. (E.) 1915

PRODUCE BROKERS COMPANY, LIMITED v. OLYMPIA OIL AND CAKE COMPANY, LIMITED.

the *Canterbury* as valid. They accordingly affirmed the award of Mr. Pinner of May 19, 1913, in favour of the appellants with an immaterial variation.

The respondents thereupon moved to set aside the awards of May 19, 1913, and June 25, 1914, on the following grounds :—

1. That each of the awards was bad on its face or wrong in point of law.

2. That the Appeal Committee exceeded their jurisdiction in determining whether the custom mentioned in the award dated June 25, 1914, had any existence in fact, or in deciding that the Olympia Oil and Cake Company, Limited, were bound by the alleged custom to accept the appropriation therein referred to, which was invalid under the terms of the contract.

3. That the members of the Appeal Committee misconducted themselves as arbitrators in not giving proper effect to the answers of the Court to the questions of law submitted by them in the form of a special case for the opinion of the Court and the judgments delivered by the Court on May 19, 1914, in exceeding their jurisdiction as aforesaid, and in determining the question of custom without any evidence, or without giving the Olympia Oil and Cake Company, Limited, any opportunity of adducing evidence to disprove the alleged custom or of putting their contentions with reference to the alleged custom before the Appeal Committee, or of requesting the Appeal Committee to state a case for the opinion of the Court on the questions of law arising out of the question of the alleged custom, or in not holding any proper judicial investigation of the matters relating to the alleged custom.

4. That the award of June 25, 1914, was improperly procured by reason of the matters mentioned in paragraph 3 hereof.

The Divisional Court (Horridge and Rowlatt JJ.) held (1.) that the custom was not inconsistent with the terms of the contract, but (2.) that, as laid down in *Hutcheson & Co.* v. *Eaton & Son* (1) and *In re North Western Rubber Co. and Hiittenbach & Co.* (2), the question of the existence of the custom was outside the jurisdiction of the arbitrators, and that therefore a further inquiry must be held by the Divisional Court as to the existence or non-existence

(1) 13 Q. B. D. 861. (2) [1908] 2 K. B. 907.

of the custom. They accordingly adjourned the motion in order to give the parties an opportunity of filing further affidavits on this question.

The Court of Appeal (Buckley, Phillimore, and Pickford L.JJ.), solely on the authority of *Hutcheson & Co.* v. *Eaton & Son* (1) and *In re North Western Rubber Co. and Hüttenbach & Co.* (2) and against their own opinion, affirmed the decision of the Divisional Court.

1915. Oct. 15, 18. *Sir Robert Finlay, K.C.* and *Leck, K.C.* (with them *F. D. MacKinnon, K.C.*), for the appellants. Under a clause in a contract referring to arbitration all disputes arising out of the contract it is competent to the arbitrator to determine the existence of a custom affecting the rights and obligations of the parties under the contract provided the custom is not inconsistent with the terms of the contract. This case is really an appeal from *Hutcheson & Co.* v. *Eaton & Son* (1) and *In re North Western Rubber Co. and Hüttenbach & Co.* (2) The appellants rely upon the reasoning of the Court of Appeal, who held that they were bound by those two cases, but thought they were wrongly decided. The contract referred to in the arbitration clause is the written contract as explained by the custom, which is part of the contract, and the meaning of the written contract cannot be ascertained until the custom is ascertained: *Humfrey* v. *Dale.* (3) Therefore the arbitrator under a clause of this nature must have jurisdiction to determine the existence of the custom. Then it is objected that the Arbitral Committee called no evidence of the custom; but where the arbitrators are trade experts they may rely upon their own knowledge and experience of any custom existing in the trade, and are not bound to call evidence upon the point: *Eads* v. *Williams* (4), per Lord Cranworth L.C.

[LORD PARMOOR referred to *Duke of Buccleuch* v. *Metropolitan Board of Works.* (5)]

Leslie Scott, K.C., and *C. Robertson Dunlop*, for the respondents. The whole controversy turns upon the language of the submission.

(1) 13 Q. B. D. 861.
(2) [1908] 2 K. B. 907.
(3) (1857) 7 E. & B. 266, 275.
(4) (1854) 24 L. J. (Ch.) 531, 533.
(5) (1872) L. R. 5 H. L. 418.

H. L. (E.) 1915 — PRODUCE BROKERS COMPANY, LIMITED v. OLYMPIA OIL AND CAKE COMPANY, LIMITED.

What is the meaning of "this contract"? Is it or is it not a contract with a customary term added? The limit of the arbitrator's jurisdiction is defined by the terms of the contract, and a submission in this form cannot give the arbitrator jurisdiction to determine what are the terms of the contract except subject to review by the Court. If the arbitral tribunal finds a custom where none exists it exceeds its jurisdiction, because the scope of the submission is the contract as it really was: *Bunbury* v. *Fuller* (1); *Thompson* v. *Ingham* (2); *In re North Western Rubber Co. and Hüttenbach & Co.* (3), per Fletcher Moulton L.J.

The respondents do not insist upon their charge of misconduct against the arbitral tribunal.

The House took time for consideration.

Nov. 15. EARL LOREBURN. My Lords, if in this case we allow the appeal it is to be understood that we are not differing from the opinions expressed by the Lords Justices. The Court of Appeal felt itself bound by previous decisions of co-ordinate authority though it disapproved of them, while this House is not bound. I agree with the opinions expressed by all the Lords Justices, and propose to give effect to them by moving that the order appealed from be reversed.

It is in one aspect of it a deplorable case. These men of business made contracts and therein agreed to arbitrate upon all disputes arising out of their contracts. Yet there have already been seven distinct stages of argument and decision, four of them in Courts of law, upon a dispute arising on those contracts, and the end is not yet. I do not know how many more stages there will be. Parties have a right to prefer what some may consider the imperfect though expeditious wisdom of arbitrators to the slower and more costly justice of His Majesty's Courts. It is to be regretted when they have to encounter the inconveniences of both methods with the advantage of neither.

I will not recapitulate the facts of this case or the steps by which it has been brought here. I go direct to the notice of motion

(1) (1853) 9 Ex. 111, 140. (2) (1850) 14 Q. B. 710, 718.
(3) [1908] 2 K. B. 907, 920, 921.

of July 11, 1914, by which the Olympia Company sought to set aside two awards of the same tenor. The appeal before your Lordships springs from this motion. The Olympia Company in their notice specified four grounds upon which they relied to set aside these awards, the gist of their complaint throughout being that the Arbitral Committee had found and acted upon a custom of trade.

I will deal presently with the first ground set out in this notice of motion.

The third and fourth grounds, which allege judicial misconduct by the Arbitral Committee, disappear. They were abandoned by Mr. Leslie Scott when he perceived how hopeless it must be to sustain them upon the evidence. The arbitrators needed not to hear evidence in regard to customs of a trade in which they were experts, when the custom was distinctly raised, and both parties had an opportunity of adducing evidence upon it, and neither party chose to do so. If nothing was said about this custom in the special case stated for the opinion of the High Court, it was so because the Olympia Company, who complained of the omission, did not ask that the custom should be stated in the case which they alone asked for in order to raise points which they alone put forward. Mr. Leslie Scott was well advised in abandoning these two grounds.

On the remaining ground, namely, the second, the Olympia Company partially succeeded, both in the Divisional Court and in the Court of Appeal, to the evident regret of both Courts. The point was this. The Olympia Company maintained that the Arbitral Committee had no jurisdiction to find that there was a custom of trade binding the parties, and cited two authorities. Certainly these authorities appear to be in their favour, and upon them both Courts felt bound so to hold. Accordingly they adjourned the hearing of the motion and gave both parties liberty to file affidavits as to the existence of the alleged custom. They did so on the footing that there was in the Arbitral Committee no jurisdiction finally to find the custom.

My Lords, in my opinion the Appeal Arbitral Committee had jurisdiction finally to find as they did in regard to the custom of trade. I confess that I am no better able than was Buckley L.J. to understand the contrary principle laid down in *Hutcheson & Co.* v.

H. L. (E.) 1915

PRODUCE BROKERS COMPANY, LIMITED v. OLYMPIA OIL AND CAKE COMPANY, LIMITED.

Earl Loreburn.

Eaton & Son (1) and in *In re North Western Rubber Co. and Hüttenbach & Co.* (2) When an arbitrator has power, as here, to decide all disputes arising out of a contract, including questions of law, surely he must decide what the contract is, and he cannot decide that without introducing the custom. These decisions seem to mean that he can decide on the existence of a custom only if he decides rightly. There is no magic in a custom that an issue as to its existence should be treated differently from any other issue of fact before an arbitral tribunal. With all respect, it seems to me that a Court plainly usurps the function of an arbitrator when it claims to decide that issue for itself on a submission such as we find here. It is true that a Court will decide for itself whether an inferior Court has clothed itself with jurisdiction by an erroneous finding on something vital to the jurisdiction. I do not see the analogy. Here the jurisdiction of the Arbitral Committee to decide the dispute did not depend upon its finding about the custom. There was an agreement of the parties to submit all disputes, and this certainly is a dispute. Therefore the second ground for the motion in the King's Bench Division fails as do the third and fourth.

I come back to the first ground, which was that each of the awards was "bad on its face or wrong in point of law." I understand this to mean that on the face of the awards there is an incompatibility between the written contract and the custom. It may mean something more, as, for instance, that the custom was unreasonable, for we did not enter upon this part of the case. I was tempted to suggest that, having the case before us, we should dispose of it once for all by deciding this first ground also. But the respondents deprecated that course, and the appellants were lukewarm, if not disinclined, and it is undesirable that this House should, without necessity, act as a Court of first instance without the aid of considered judgments in other Courts which are of priceless value to a final Court of appeal. Therefore, the first ground of the motion still remains to be disposed of by the Divisional Court. Not having heard argument, I express no opinion upon the scope of the first ground, still less upon its merits.

I think the best course will be to reverse the order appealed from, to declare that the motion of which notice was given on July 11,

(1) 13 Q. B. D. 861. (2) [1908] 2 K. B. 907.

1914, ought to be dismissed as to grounds 2, 3, and 4 contained in the notice, and that the case be remitted to the Divisional Court to determine it upon the first ground contained in the notice.

The reversal is merely a technical reversal, for the judgments were given in accordance with previous decisions and against the opinion of the judges.

LORD ATKINSON. My Lords, owing to the course the argument in this case has taken, the second only of several questions raised by the notice of motion to set aside the award of the Appeal Committee, upon which the Divisional Court made the order affirmed by the order now appealed from, remains to be decided by this House.

That question is whether the Appeal Committee exceeded their jurisdiction in determining that the usage or custom mentioned in the award, dated June 25, 1914, existed in fact, or in deciding that the respondent company were bound by the alleged usage to accept the appropriation therein referred to.

The Divisional Court by their order directed that the motion should stand adjourned, both parties to be at liberty to file, within a week, further affidavits on the question of the existence of the custom mentioned in the awards. This order amounts, therefore, in effect, to a decision (1.) that arbitrators or an umpire were incompetent to decide finally the question of the existence of a trade usage or custom affecting obligations under a commercial contract, though the submission entered into by the parties fully empowered them to decide all disputes arising out of that contract, and (2.) that the Divisional Court had itself jurisdiction to determine that question.

The Court of Appeal, feeling itself bound by the authority of the two cases of *Hutcheson & Co. v. Eaton & Son* (1) and *In re North Western Rubber Co. and Hüttenbach & Co.* (2), upheld this decision, but at the same time, by a line of reasoning absolutely convincing, in my opinion, showed that those cases were wrongly decided. Prima facie one would suppose that authority to decide disputes arising out of a contract necessarily conferred authority to decide what were the terms of that contract. It would appear to me to be impossible for any judge or arbitrator to determine whether any particular dispute arose out of a contract

(1) 13 Q. B. D. 861. (2) [1908] 2 K. B. 907.

H. L. (E.)
1915
PRODUCE BROKERS COMPANY, LIMITED
v.
OLYMPIA OIL AND CAKE COMPANY, LIMITED.
Lord Atkinson.

unless and until he knows what that contract is. This involves that the arbitrator must in such a case construe the contract which the parties entered into, and thus determine what they meant to express by the language they have used. If, for instance, in a contract relating to any art or trade or business the parties use terms having technical meanings in that art, trade, or business, then those terms should prima facie have that meaning attributed to them, simply because the parties to the contract presumably used those terms in their technical sense. In such a case it would appear to me that arbitrators or an umpire would, under such a submission as exists in this case, necessarily have authority to determine what was the technical meaning of those technical terms.

It would, I think, be quite impossible for any Court of law not to treat such a determination as one made with full authority, and final in itself. Now, is there any essential difference between such a case as that and a case where it is sought to construe the language of a contract in relation to, and through the medium of, a trade usage or custom? In my opinion there is not. The language expressing a trade custom is taken to be imported into the language used by the contracting parties, whether written or verbal, because it is presumed that they had the usage in their minds when they made their contract, made it in reference to that usage, and intended that the usage or custom should form part of it. If they have used language in their contract inconsistent with the custom, that is one of the most effectual ways of negativing this presumption, excluding the custom, and declaring that their contract is unaffected by it.

Erle C.J. in *Meyer* v. *Dresser* (1) states the law upon this point very neatly thus: "In the cases where such local usages are imported into a contract, it is because they tacitly form part of it, like those contracts in which we find the words 'and other usual terms.' They then form part of the contract itself. The contract expresses what is peculiar to the bargain between the parties, and the usage supplies the rest."

Parke B. in *Metzner* v. *Bolton* (2) says: "It is quite certain that general usages are tacitly annexed to all contracts relating to the business with reference to which they are made, unless the terms of such contracts expressly or impliedly exclude them." And

(1) (1864) 16 C. B. (N.S.) 646, 660.
(2) (1854) 9 Ex. 518, 521.

Lord Blackburn, in *Tucker* v. *Linger* (1), speaking of an agricultural usage in reference to a lease of land, expresses himself thus: "Now is this custom excluded by the terms of the agreement? The custom, when proved, is to be considered as part of the agreement; and if the agreement be in writing, though the custom is not written it is to be treated exactly as if that unwritten customary clause had been written out at length. But if upon the face of the written agreement there is some clause which expressly says, 'We exclude the unwritten customary incident,' of course it is excluded; and if there is any written clause which is inconsistent with it to such an extent as impliedly to exclude it, then, too, the unwritten clause must yield to and is excluded by the written one."

This inclusion or exclusion of the so-called "customary clause" is thus necessarily involved in the determination of what is the contract of the parties, and the existence or non-existence of the custom is necessarily involved in determining whether the "customary clause" is to be included or not.

I do not know that it was disputed by Mr. Leslie Scott, on behalf of the respondents, that a "customary clause" not expressly or impliedly excluded in the manner pointed out by Lord Blackburn would form part of the contract of the parties, or that when included the language of the so-called "customary clause" is to be taken as the language of the contracting parties. He took his stand, rather, on the two decisions of the Court of Appeal already referred to, and contended that the decisions of the arbitrators, under such a submission to arbitration as exists in the present case, on the question of the existence of the custom alleged was like, and should be treated in the same way as, the decision of an inferior tribunal, in its own favour, upon some question of fact or law which gave it jurisdiction to decide a case or make an order.

I am quite unable to accept that view. It is quite true that under this reference disputes may arise for the decision of the arbitrators, if the "customary clause" be incorporated, which would not arise had it been excluded, and in that sense the field of their judicial investigation might be extended to additional members of the class of matters referred; but that is a wholly different thing. If the contract of the parties were contained in a number of letters, some of

(1) (1883) 8 App. Cas. 508, 511.

H. L. (E.) 1915

PRODUCE BROKERS COMPANY, LIMITED v. OLYMPIA OIL AND CAKE COMPANY, LIMITED.

Lord Atkinson.

which were ambiguously worded and capable of two or more different constructions, it could not, I think, be contended that the arbitrators would not, under such a reference as the present, be entitled to decide finally that a particular construction of the ambiguous letters was their true construction, though on that construction a greater number of points in dispute might arise for decision than would have arisen on any other construction. It could not be objected that by deciding as they did they gave themselves jurisdiction over the additional matters of dispute, and that therefore their decision on the construction of the letters was not final, but subject to review by the Court on a motion to set aside their award. The answer of the arbitrators to such an objection, if made, would naturally and rightly be, "We got full authority to decide all disputes arising out of the contract of the parties; that necessarily involved deciding what the contract was; we have done this by construing their letters; the extra number of disputes arising on the construction we have adopted is immaterial."

For my part, I am entirely unable to see upon what ground arbitrators who are expressly or impliedly authorized by the terms of a reference to determine finally what are the terms of a contract into which parties have entered are not authorized to determine finally whether the language, written or verbal, which they have employed constitutes by itself their contract, or, to use Erle C.J.'s words, whether that language only expresses what is peculiar to their bargain, leaving some trade usage to supply the rest. As a non-existing usage cannot supply anything, it follows that they must have authority to decide finally if the alleged usage exists. I think, therefore, that the two authorities by which the Court of Appeal felt themselves bound in the present case were wrongly decided. Upon that point the reasoning, especially that of Buckley L.J. (as he then was), is, in my opinion, as I have already said, quite convincing. The appeal should, I therefore think, be allowed with costs, and I approve of the motion suggested by my noble and learned friend on the woolsack.

LORD PARKER OF WADDINGTON. (1) My Lords, I agree that this appeal ought to be allowed.

(1) Read by Lord Sumner.

The binding force of an award must depend in every case on the submission. If the question which the arbitrator takes upon himself to decide is not in fact within the submission the award is a nullity. The arbitrator cannot make his award binding by holding contrary to the true facts that the question which he affects to determine is within the submission. For example: If disputes arise under any particular contract and the parties thereupon agree to refer all disputes arising under that contract, the arbitrator cannot give himself jurisdiction by deciding that any particular dispute arises under the contract in question when it does not, in fact, so arise. This seems reasonably clear when the submission is subsequent to the contract. Where, however, the submission is contained in the contract it may be a question of construction whether such expressions as "all disputes arising under this contract" include questions as to the ambit of the submission itself. Prima facie I do not think that they would, though it is unnecessary to decide the point.

In the present case the submission covers all disputes arising out of the contract, including disputes on questions of law. Questions as to the true meaning and effect of the contract, with the possible exception of questions as to the ambit of the submission itself, are therefore left to the arbitrator. In order to ascertain the meaning and effect of the contract the arbitrator is bound to admit evidence of and consider all relevant facts. The existence or non-existence of any state of circumstances, which, if proved, would be relevant on any issue as to the true meaning and effect of the contract, must consequently be within the submission. Clearly mercantile contracts, such as the one in question, fall to be interpreted by the light of any custom prevailing in the trade. "It has long been settled," says Parke B. in *Hutton* v. *Warren* (1), "that, in commercial transactions, extrinsic evidence of custom and usage is admissible to annex incidents to written contracts, in matters with respect to which they are silent. The same rule has also been applied to contracts in other transactions of life, in which known usages have been established and prevailed; and this has been done upon the principle of presumption that, in such transactions, the parties did not mean to express in writing the whole of the contract by which

(1) (1836) 1 M. & W. 466, 475.

H. L. (E.) 1915

PRODUCE BROKERS COMPANY, LIMITED v. OLYMPIA OIL AND CAKE COMPANY, LIMITED.

Lord Parker of Waddington.

they intended to be bound, but a contract with reference to those known usages." It follows that existence or non-existence of the custom alleged in the present case is relevant to the true meaning and effect of the contract, and is, therefore, within the submission.

The respondents endeavour to displace this conclusion in two ways. First, they contend that the expression " this contract " in the submission means this written document taken apart from all extrinsic facts which might be relevant in determining its true meaning and effect. Such an interpretation of the submission would, in my opinion, defeat the primary object the parties must have had in view. It would be of no use to any one to arbitrate and obtain an award as to what the contract would mean if all relevant extrinsic evidence were excluded. The object of every such clause is to determine the liabilities of the parties having regard to all relevant facts.

Secondly, the respondents argued that the effect of the award is to subject them to a liability which does not arise under or by virtue of the contract, but which arises out of the custom either taken alone or in connection with the contract. This again appears to me to be fallacious. The liability of any party to a contract is none the less a liability arising under the contract because the contract itself has to be interpreted with reference to a custom prevailing in the trade.

I therefore concur in the motion proposed by my noble and learned friend on the woolsack.

Lord Sumner. My Lords, I agree. The question in this appeal is purely one of construction. Clause 13 says, " All disputes from time to time arising out of this contract . . . . shall be referred to arbitration, according to the rules endorsed on this contract." Your Lordships have to decide how much is included in this submission.

The words are less precise than they look. In strictness disputes arise not out of a contract but out of conflicting views taken by the parties to the contract. The determination of such disputes may involve the determination not only of the meaning of the language used but of a variety of subordinate issues of fact; and it is clear

that the jurisdiction which the submission confers is, and is intended to be, wide.

The precise dispute which arose and was referred in this case is stated in the document of May 9, 1913, in which the arbitrators record their inability to agree and call on their umpire to decide. It is this: "A dispute has arisen . . . . as to whether the appropriation of about 6600 tons Soya beans per s.s. *Canterbury*, under contract dated May 30, 1912, is a good appropriation in the terms of the contract, and as such to be accepted by the buyers." On the face of it this dispute arises "out of" some contract, which can be no other than that of May 30, 1912. So far the dispute and the whole of the dispute seems to be within the submission.

It must be taken on the affidavits that at some stage of the hearings—whether only before the Committee of Appeal or at the earlier stage may not be clear—the sellers affirmed that a custom existed which was applicable to this transaction and conclusive in their favour. The buyers, if they did not actually deny the existence of such a custom, at any rate put it in issue. The matter was validly raised. Admittedly it was the duty of the tribunal to investigate it. The question is whether their decision on the existence of the custom was final or is open to review. The difference is between deciding facts on an issue submitted to the tribunal and investigating facts to see whether they fall within the jurisdiction conferred by the submission.

My Lords, nobody doubts that arbitrators have a limited jurisdiction, conferred by the submission, which they cannot exceed, and that equally they cannot amplify that jurisdiction by erroneously finding facts which the submission does not authorize them to decide as arbitrators. Such questions, however, do not arise if on the true construction of the submission it extends to and includes authority to decide, as arbitrators, this incidental issue as to the existence of the custom in question.

The argument for the respondents, which gained point by its brevity, may be put in a nutshell. It was said that this dispute does not arise out of the contract, but out of the contract plus something else—to wit, the custom. One asks what is meant by "the contract" according to this argument? If it is the terms written and printed on the piece of paper and no more, the argument might be

H. L. (E.) 1915

PRODUCE BROKERS COMPANY, LIMITED v. OLYMPIA OIL AND CAKE COMPANY, LIMITED.

Lord Sumner.

good. Whether the words of the contract as a whole are or are not inconsistent with the incorporation of the custom, in either case the words of the submission would then exclude it. Questions of custom are not referred on this hypothesis, but it is to be supposed that the parties meant to refer part only of their possible disputes when they adopted the trade tribunal. The result is that they chose to refer to trade arbitrators for their final decision the construction and effect of the written contract, although involving questions of law about which they might know nothing, but to reserve to the High Court the ultimate decision of any issue as to the existence of a trade custom, I suppose because the High Court would know equally little about it, while trade arbitrators might know too much.

This seems to me an impossibly narrow construction, none the less that in the latter part of the same sentence the "contract" evidently is the piece of paper—something with a back to it on which rules are indorsed. Besides, the logical result would be that in this case the arbitrators would have no jurisdiction at all, since there is no dispute of which it can be predicated that it arises—that is, wholly arises—only out of the terms written and printed on the piece of paper. The actual dispute is indivisible—the point about the custom is an integral part of it. It could only be decided without raising this point at the cost of real injustice to the sellers. On the other hand, if a dispute, which only in part arises out of the terms written and printed on the piece of paper, is within the submission, the respondents have no case.

Rather inconsistently, as I think, it is admitted that the arbitrators had some authority to inquire into the existence of the custom, and, having informed their minds, had jurisdiction to give effect to it, if it existed—that is, if it existed in the opinion of the High Court or of any tribunal of appeal therefrom, not if it merely existed in their own. This seems to dwell on the limited character of the jurisdiction of arbitrators, while overlooking the real question, which is the definition of the limits as expressed in the submission. If "this contract" in the arbitration clause means the real bargain between the parties, expressed in the written and printed terms, though, where trade customs exist and apply, not entirely so expressed, then the jurisdiction is complete. The custom, if any,

was part of the bargain. Whether there is anything in the expressed terms inconsistent with it, and, therefore, controlling or excluding it, is not before your Lordships, nor is any question of its reasonableness. If the bargain is partly expressed in ink and partly implied by the tacit incorporation of trade customs, the first function submitted to the arbitrators is to find out what it is; to read the language, to ascertain the custom, to interpret them both, and to give effect to the whole. If so, the reasoning founded on the analogy of the jurisdiction of county courts fails. The dispute, which arose in fact and which raised a question of custom, did not arise out of the contract and something else; it arose out of the contract itself, and involved the contract by raising the custom, and so was within the submission.

My Lords, it may be that the decisions in *Hutcheson & Co.* v. *Eaton & Son* (1) and *In re North Western Rubber Co. and Hüttenbach & Co.* (2), which bound the Court of Appeal, can be supported on other grounds, but in so far as, to employ the language of Brett M.R. in the former case, they answer in the negative this proposition: "Can a question whether a custom is to be added to the written contract . . . . be 'a dispute arising upon this contract'?" I think them erroneous. The proposition is really a petitio principii. Of course the arbitrators cannot add to the contract, but their admitted power to inquire into the existence of the custom provisionally is due to the very fact that in so doing they add nothing to the contract, but are rightly finding out what the contract is before interpreting and applying it. No doubt the expression that customs of trade add terms to written contracts is often used. Lord Mansfield spoke of a custom as neither altering nor contradicting an agreement but only superadding a right, as long ago as *Wigglesworth* v. *Dallison*. (3) It is more exact to say that the contractual terms, which the custom imports, are already tacitly incorporated as a part, though an unexpressed part, of the agreement between the parties. The maxim is "In contractibus tacite insunt ea quae sunt moris et consuetudinis." The ground is the same as if the admissibility of evidence of a custom were in question. "The principle on which the evidence

(1) 13 Q. B. D. 861, 866. (2) [1908] 2 K. B. 907.
(3) (1779) 1 Doug. 201.

H. L. (E.) 1915

PRODUCE BROKERS COMPANY, LIMITED v. OLYMPIA OIL AND CAKE COMPANY, LIMITED.

Lord Sumner.

is admissible," says Lord Campbell in *Humfrey* v. *Dale* (1), "is that the parties have not set down on paper the whole of their contract in all its terms, but those only which were necessary to be determined in the particular case by specific agreement . . . . leaving to implication and tacit understanding all those general and unvarying incidents which a uniform usage would annex."

On these grounds I think that the Court of Appeal, though bound to follow the earlier decisions, were right in indicating objections to them, and further that in your Lordships' House those objections should prevail. It would have been matter for regret if the construction for which the respondents contend had succeeded. During the last thirty or forty years most wholesale trades dealing in imported produce have formed trade associations, adopted standard forms of contracts which are invariably used, and created arbitral tribunals, formed exclusively of members of the association, which yearly settle thousands of trade disputes to the satisfaction of the trade. Arbitration clauses, substantially the same as that before your Lordships, are characteristic of all these forms of contract. The system has been devised by mercantile men to suit their needs and they have found it highly beneficial; they have been naturally anxious to establish trade control over the transactions of the trade as completely as possible. A construction which would have conferred on the Appeal Committee a true arbitral function as to the interpretation and performance of the printed contract, and a provisional and appealable function over so important a matter as the customs of the trade itself, would have been equally anomalous and inconvenient.

Further, I think that the transaction in question is pre-eminently one with which the established arbitral tribunal is fitted to deal in its entirety. The transaction, as I understand it, is this. The present sellers had bought back from their buyers an equal quantity of Soya beans for the same time of shipment, but at an increased price, and, as they contended, had done so on the understanding that the one contract should be set against the other. If the contracts stood they were losers to the extent of a difference of some 1850*l*. As the contracts were for the purchase and sale of

(1) 7 E. & B. 266, 275.

unascertained goods they provided for the delivery of particulars of the shipments, which the sellers elected to appropriate to the contracts. They provided further that "in case of resales" (no doubt a most common case) "copy of original appropriation shall be accepted by buyers and passed on without delay." There was also a clause providing that the contract "should be void as regards any portion shipped that may not arrive by the ship or ships declared against the contract." When the present sellers received a declaration from their sellers of the cargo per the *Canterbury*, and, before passing it on to their buyers, learnt that the *Canterbury* with her cargo was lost, they conceived that they could pass on the declaration and that their buyers would be bound to accept it, and that as the portion shipped would never arrive by the *Canterbury* or at all the contract would automatically be avoided. The return of the same declaration by the buyers on the second contract, that of repurchase, which they considered had to be set against the first, would automatically cancel that contract also. Thus, profiting by the ill-fortune of the *Canterbury*, they would escape their loss of 1850*l*. Of the merits of such a transaction and such an argument I say nothing, but the matter seems to me to be pre-eminently one to be settled in its entirety by a trade tribunal. If your Lordships had felt constrained to decide that, on the true interpretation of the arbitration clause, the Appeal Committee had power to decide the question of custom only provisionally while deciding everything else finally, I make no doubt that it would have been imperatively necessary for this and all similar associations forthwith to alter the wording of their form of contract so as to make its effect correspond to what I am sure was their intention.

LORD PARMOOR. (1) My Lords, by a contract in writing of May 30, 1912, the appellants agreed to sell to the respondents about 6000 tons of Soya beans to be shipped from an Oriental port during December, 1912, and/or January, 1913. The contract contained an arbitration clause, that "all disputes arising out of this contract shall be referred to arbitration according to the rules endorsed

(1) Read by Lord Atkinson.

H. L. (E.) 1915

PRODUCE BROKERS COMPANY, LIMITED v. OLYMPIA OIL AND CAKE COMPANY, LIMITED.

Lord Parmoor.

on this contract." The third clause of the contract provided that "in case of resales copy of original appropriation shall be accepted by buyers and passed on without delay." A dispute having arisen whether a good appropriation and tender had been made under the contract, it was referred to the arbitration tribunal.

On June 25, 1914, the Arbitration Committee of Appeal made their award in favour of the appellants, and found that, by the long-established and well-recognized custom of the trade in case of resales, buyers under this form of contract impliedly agree with their sellers that they will accept the original shipper's appropriation if passed on without delay.

On July 11, 1914, the respondents gave notice of motion to set aside the award on three grounds, but only one is material in the present appeal. This ground is that the Appeal Committee had exceeded their jurisdiction in determining whether the custom mentioned in the award had any existence in fact and in deciding that the respondents were bound by the alleged custom to accept the appropriation therein referred to which was invalid under the terms of the contract.

The Divisional Court decided in favour of the respondents, and made an order adjourning the motion to enable the parties to file further evidence on the alleged custom set out in the award, and to be at liberty to give notice requiring the attendance of the deponents before the Court for cross-examination. The effect of this order is to withdraw the question whether the alleged custom existed from the arbitration tribunal and to bring it before the Court for determination. This order was confirmed by the Court of Appeal. In giving their judgments the Lords Justices expressed a strong opinion that unless they had been bound by authority they would have come to a different conclusion.

My Lords, I agree in the opinions expressed by the Lords Justices in the Court of Appeal and in Buckley L.J.'s criticism of the cases of *Hutcheson & Co.* v. *Eaton & Son* (1) and of *In re North Western Rubber Co. and Hüttenbach & Co.* (2) It is unnecessary to refer further to these cases, but I desire to express my concurrence with the dissenting judgment of Fry L.J. in the

(1) 13 Q. B. D. 861. (2) [1908] 2 K. B. 907.

earlier case, and can see no answer to his view that an arbitration tribunal cannot decide a dispute arising under a contract without first ascertaining what the contract is, and that to enable the tribunal to ascertain the interpretation of the contract it is competent for it to have regard to all customs, if any, which affect its construction.

In my opinion the respondents fail to establish the initial step on which their contention is based. They are unable to make good the allegation that there has been any excess of jurisdiction. It is not sufficient to suggest that the arbitration tribunal has gone wrong, having made an error on some matter of fact or law. Under the procedure of the Arbitration Act questions of law which arise in the course of an arbitration can be brought before the Court either in a consultative case or by stating the final award in the form of a special case. In the present instance a consultative case was brought before the Divisional Court, and the arbitration tribunal states that it has followed the directions which the Court gave. The question of jurisdiction depends on different considerations. It is not denied that a dispute did arise under the contract within the meaning of the submission in the arbitration clause. The dispute was whether, under the terms of the contract, the sellers had made an appropriation and tender of the goods sold to the buyers. It is not possible for the arbitration tribunal to determine this dispute, which it is within their jurisdiction to determine, without construing the contract and ascertaining the nature of the bargain between the parties.

In the present instance the appellants alleged a mercantile custom which, if reasonable in itself and not contradictory to the written language in the contract, directly affects the construction of the contract.

The respondents, however, contended that it is not within the jurisdiction of an arbitration tribunal to determine the existence and effect of a mercantile custom, or at least not to determine it conclusively, although such mercantile custom is included in the contract, and it is impossible to determine the dispute which has been referred, if the inquiry into the existence and effect of such custom is excluded from the consideration of the tribunal. In other words, that whenever the existence of a

H. L. (E.) 1915

PRODUCE BROKERS COMPANY, LIMITED v. OLYMPIA OIL AND CAKE COMPANY, LIMITED.

Lord Parmoor.

mercantile custom comes in question, it is for the decision not of the arbitrator but of the Courts, and that the Divisional Court was right in directing an inquiry before itself by affidavit and cross-examination.

My Lords, I cannot assent to this proposition. The plea of want of jurisdiction cannot be maintained, unless the determination of the arbitration tribunal as to the existence of the alleged mercantile custom can be said to be an alteration, either by omission or addition, of the contract under which the limit of the jurisdiction of the arbitration tribunal has been agreed between the parties. There is no question that an arbitration tribunal has no authority to exercise jurisdiction outside the conventional limit agreed in the terms of the submission. It is quite unnecessary to emphasize a point which is beyond controversy. The answer is that a mercantile custom cannot in any way alter the bargain made either by omission or addition, but that it is included in the bargain and affects and regulates the rights and obligations of the parties to the bargain. In the present instance the language used in the written contract is said to have a conventional meaning based on mercantile custom. The meaning and intention of the parties as expressed in the contract cannot be ascertained without first determining whether the language used should be conventionally interpreted in accordance with the implication which the custom would introduce if its existence is proved. It is a matter of the proper interpretation of the language which the parties have used, which is always a matter of construction. I have stated above that if an error in law is made there are the remedies provided by the Arbitration Act, and the further remedy of direct application to the Courts if an award is bad on its face.

In order to meet this difficulty Mr. Leslie Scott argued that the words " the contract " in the arbitration clause were limited to so much of the contract between the parties as appeared in the actual written language, although this did not contain the true bargain between the parties or regulate their rights and obligations in reference to the dispute which had arisen. I think that to import such a limitation is inconsistent with the terms of the submission, and that the parties did not agree to refer a dispute, except one which had arisen in reference to the bargain which they had made,

and the decision of which would affect their mutual rights and obligations.

In my opinion the appeal should be allowed.

Order of the Court of Appeal reversed. Declare that the motion to set aside the awards ought to be dismissed as to grounds 2, 3, *and* 4 *contained in the notice of motion. The respondents to pay the costs in the Courts below and also the costs of the appeal to this House. The cause to be remitted back to the King's Bench Division to determine it upon the first ground contained in the notice of motion.*

Lords' Journals, November 15, 1915.

Solicitors for appellants: *Waltons & Co.*

Solicitors for respondents: *William A. Crump & Son, for Andrew M. Jackson & Co., Hull.*

[HOUSE OF LORDS.]

METROPOLITAN WATER BOARD . . APPELLANTS;

AND

ASSESSMENT COMMITTEE OF CHERTSEY UNION . . . . . RESPONDENTS.

H. L. (E.)* 1915 *Dec.* 9.

Rating—Waterworks—Assessment—Indirectly productive Portion of Undertaking—Annual Value—Interest on Cost of Land and Buildings—Rate of Interest—Added Value in respect of Special Fitness of Land for Purposes of Undertaking.

Upon an appeal by a Water Board against an assessment to the poor rate of certain land vested in the Board by Act of Parliament, and comprising an intake from the river Thames and a pumping station, quarter sessions, in accordance with the usual practice in rating indirectly productive portions of a water undertaking,

---

* *Present:* EARL LOREBURN, LORD ATKINSON, LORD SHAW OF DUNFERMLINE, and LORD PARKER OF WADDINGTON.

H. L. (E.)
1915
METROPOLITAN WATER BOARD v. CHERTSEY ASSESSMENT COMMITTEE.

assessed the annual value of the hereditaments at 4 per cent. on the cost of the land and 5 per cent. on the cost of the buildings; and they held (1.) that no further sum should be added for enhanced value in respect of the user of the intake and the statutory right of appropriating water from the river by that means, or in respect of the special fitness of the land for that purpose; (2.) that the percentage on cost representing the annual value ought not to be reduced by reason of the special facilities of the Water Board for borrowing below the current rate of interest:—

Held, first, that the user of the intake and the statutory right of appropriating water by that means were not rateable subjects, and that, in the absence of evidence to the contrary, the special fitness of the land for the purposes of the undertaking must be taken to have been covered by the price paid for the land; secondly, that, in cases where it was proper to ascertain the annual value on the basis of interest on cost, the rate of interest did not depend upon the financial position of the occupier.

Held, therefore, that quarter sessions were right on both points.

New River Co. v. *Hertford Union* [1902] 2 K. B. 597 considered.

Decision of the Court of Appeal reversed.

APPEAL from an order of the Court of Appeal affirming an order of the Divisional Court upon a case stated by the Court of Quarter Sessions for the county of Surrey.

The appellants, the Metropolitan Water Board, were the owners and occupiers of certain hereditaments in the parish of Walton-on-Thames, comprising an intake from the river Thames, a pumping station, and other buildings. On May 9, 1912, the respondents, the Chertsey Union Assessment Committee, made a rate in which these premises were assessed at a gross estimated rental of 15,810*l.* and at a rateable value of 10,550*l.* The appellants appealed to the Surrey Quarter Sessions, who reduced the assessment in the manner hereinafter mentioned, subject to the opinion of the King's Bench Division upon the case stated.

The appellants were the owners and occupiers of certain large reservoirs and other hereditaments in the parish of Walton-on-Thames. The appellants were incorporated under the Metropolis Water Act, 1902 (2 Edw. 7, c. 41), and the undertakings of the metropolitan water companies (with certain exceptions) were transferred to them. One of these undertakings was the undertaking of the Southwark and Vauxhall Water Company.

In 1898 this company was authorized by the Southwark and

Vauxhall Water Act, 1898 (61 & 62 Vict. c. cxv.), to make and maintain the following among other works :—

A pumping station to be situate in the parish of Walton-on-Thames.

An aqueduct, conduit, or line of pipes (line of pipes No. 1) to be situate wholly in the said parish commencing in the river Thames 650 yards or thereabouts eastward from the eastern gates of Sunbury Lock and terminating 40 yards or thereabouts north-west of the northern boundary of Hurst Road.

The time fixed for completion of the pumping station and the line of pipes was seven years from August 6, 1898, and provision was contained in the said Act for a varying payment to the Conservators of the river Thames free of all rates and deductions up to a maximum sum of 1957*l.* 15*s.* per annum.

The Southwark and Vauxhall Water Company accordingly in the year 1899 acquired the land on which were situated the said pumping station and line of pipes, but did not construct the said pumping station or line of pipes before the creation of the appellants under the Metropolis Water Act, 1902, and the appellants allowed the power to lapse. But by s. 66 of the Metropolitan Water Board (New Works) Act, 1911 (1 & 2 Geo. 5, c. cxviii.), the powers of the appellants (as successors in title of the Southwark Company) for the construction and completion of the said pumping station, aqueduct, conduit, or line of pipes were revived and continued.

The appellants duly exercised the powers so revived and continued, and the said pumping station and aqueduct, conduit, or line of pipes were duly constructed by them in or about the year 1911, and were opened and commenced to be used in the month of June in that year.

The area of land used in connection with the said pumping station and aqueduct, conduit, or line of pipes was about nine and a quarter acres in extent. The land was separated from the river Thames by a towing-path about twenty-three feet wide. The water was obtained from the river Thames through an intake in the river and passed under the towing-path there, and thence flowed by gravitation to the pumping house along an aqueduct or canal constructed for that purpose into large underground tanks. From these it was elevated by the pumps into several principal storage

H. L. (E.) 1915 METROPOLITAN WATER BOARD v. CHERTSEY ASSESSMENT COMMITTEE.

reservoirs of the appellants' system which were adjacent to the pumping station. The present pumps had a capacity of lifting 100,000,000 gallons per day, and there were also certain turbines which could pump an extra 30,000,000 gallons per day. The intake and canal were capable of delivering 200,000,000 gallons per day.

By s. 3 of the Thames Conservancy Act, 1911 (1 & 2 Geo. 5, c. lvii.), the appellants were required to pay as from January 1, 1912, in each of the next succeeding years to the Conservators of the river Thames the annual sum of 40,000*l.* and increasing annual sums in succeeding years.

By s. 4 it was enacted that, subject as thereinafter provided, it should be lawful for the appellants as from the commencement of that Act, by means of all or any one or more of the intakes which they might for the time being lawfully use, to take, divert, and impound in any one day any quantity of water from the river Thames not exceeding 1,200,000,000 gallons.

By s. 10, sub-s. 1, in the event of the Board desiring at any time to alter the position and number of their intakes, the consent of the Conservators, if by law required, might be withheld on the ground that such alteration would prejudice or interfere with the navigation of the river Thames or for other good cause, but such consent should not be unreasonably withheld.

The appellants by virtue of the Metropolis Water Act, 1902, had succeeded to the powers of certain other water companies supplying the metropolis and certain other districts with water, which companies had under their special Acts the right to take water by means of intakes from the river Thames, and it was proved before the quarter sessions that there were eleven other intakes besides the intake in question on this appeal by means of which a supply of water could be taken, though in fact some of these were not now used and some were only used occasionally. The intake in question was in fact the largest of these intakes except that at Staines, which was of about the same capacity.

On May 9, 1912, the rate in question was made.

Upon the appeal to the Court of quarter sessions the respondents gave evidence that the method by which the assessment of the hereditaments in question should be ascertained was by taking a

certain percentage (4 per cent.) on the cost of the land and a certain percentage (5 per cent.) on the cost of the buildings, to which should be added a further sum as being an enhanced value in respect of the user made of the intake and the statutory right of appropriating water drawn from the river Thames by means thereof, and the proximity to the river for taking water from the river into the said aqueduct or canal to the appellants' pumping tanks, and that the said piece of land in question had an added value by reason of its special fitness for this purpose. They contended that the aggregate of such percentage and enhanced value was the rent at which the premises might reasonably be expected to let from year to year, and they relied on *New River Co.* v. *Hertford Union.* (1)

It was contended on behalf of the appellants, and evidence was given by them, that there was no reason in this case to depart from the ordinary method of assessing the indirectly productive portions of waterworks and similar undertakings, namely, to fix the rent that would be paid by the hypothetical tenant by taking certain percentages on the value as evidenced by the cost of the land and works respectively; that the appellants had in all twelve intakes and might take the whole or any portion of the water which they were entitled to abstract from the Thames through any or all of these inlets; that some of these inlets were in fact used regularly and some occasionally; that they also had the right by reason of s. 10, sub-s. 1, of the Thames Conservancy Act, 1911, to construct and use other inlets subject to the consent of the Conservators, which consent was not to be unreasonably withheld; that the particular piece of land whose rateable value was in question was not more suitable for the purposes of an intake than other lands abutting upon the river in the immediate neighbourhood; that the increased value (if any) to the hypothetical tenant of the said hereditament by reason of its capacity for use as an inlet was already covered by the price which had been given for the said land; and that there was therefore nothing to be added to the value arrived at by the method of assessment proposed by the appellants. The appellants contended that by reason of the matters set out above the case of *New River Co.* v. *Hertford Union* (1) had no application to the assessment now in question, while formally reserving their

(1) [1902] 2 K. B. 597.

H. L. (E.) 1915

METROPOLITAN WATER BOARD v. CHERTSEY ASSESSMENT COMMITTEE.

right to contend that the decision was wrong should the matter go to a Court where that contention was open to them.

Evidence was called by the appellants that the price paid by the Southwark and Vauxhall Water Company for the said land was greatly in excess of the amount paid for other land in the neighbourhood. The respondents on the other hand gave evidence that the price paid for the said land was its fair market price as land at the time of its purchase.

The appellants also contended that by reason of the nature of the said undertaking, the provisions of the Metropolis Water Act, 1902, and the restrictions imposed on the making of profits and the disposal of the receipts of the said undertaking, they were the only possible tenants of the hereditaments in question, and that the rent of the hypothetical tenant should therefore be fixed in view of what they would be prepared to pay for the said hereditaments.

Evidence was given on their behalf showing that the average rate of interest which they had had to pay for money borrowed during the last three years was 3*l.* 9*s.* per cent., and they contended that the rent of the hypothetical tenant should be fixed at a sum equal to $3\frac{1}{2}$ per cent. on the cost of the land and the works. The respondents gave evidence, and it was admitted by the appellants, that the stocks of the appellants representing the money which they had so borrowed now stood at a price to yield 4 per cent.

The cost of the land and the works was proved by the appellants to be as follows: Land, 4000*l.*; works, 151,516*l.*

The Court of quarter sessions accepted the contention of the appellants as to the method of arriving at the assessment of the hereditaments in question, but rejected their contention that they were in a different position from other water companies so that a lower rate of interest than the ordinary should be taken. They also rejected the contention of the respondents that a further sum should be added to the figures arrived at by taking the ordinary percentages on the value of the works and lands. They accordingly allowed the appeals with costs and amended the rates by reducing the gross value from 15,810*l.* to 11,677*l.* and the rateable value from 10,550*l.* to 7785*l.*

The question for the opinion of the High Court was, Was the Court of quarter sessions wrong in law in deciding and ascertaining

the rateable value of the said hereditaments in the manner above set forth and in rejecting the contentions of the parties which were rejected as above set forth?

By their judgment the Court of quarter sessions found that the undertaking in question should be dealt with under the ordinary rules of 5 per cent. for buildings and 4 per cent. for land in the first place; that the facts in this case were clearly distinguishable from those in the *Hertford Case* (1); and that there was nothing to be added to assessment in respect of the adaptability of the property in question.

The Divisional Court (Avory, Rowlatt, and Shearman JJ.) held that an addition ought to have been made in respect of the enhanced value above referred to, but that as regards the rate of interest the quarter sessions were right in not taking into account the special borrowing facilities of the appellants, and their decision was affirmed by the Court of Appeal (Buckley, Pickford, and Bankes L.JJ.).

1915. Oct. 26, 28, 29; Nov. 1. *Ryde, K.C.*, and *Abady* (for the *Hon. H. Fletcher Moulton*, serving with His Majesty's Forces), for the appellants. 1. As to the rate of interest on cost, after ascertaining the true capital value the fact that the purchaser can borrow at 3 per cent. is a circumstance to be taken into account in dealing with property of this peculiar character, where there is no real market for the property, and where the Water Board are the only possible tenants. If the special duties imposed by the statute upon the occupier are to be taken into account, so also the special powers conferred upon the occupier by the same statute must be taken into account: *London County Council* v. *Erith Overseers.* (2) The quarter sessions as a matter of law have excluded this factor altogether and their decision can therefore be reviewed. If they had treated the special borrowing facilities of the Water Board as some evidence upon the question of the rate of interest to be charged and had nevertheless come to the same conclusion, it is conceded that the Board would have no remedy, as that would be an erroneous decision on fact.

2. The claim for added value attributable to the user of the intake and the statutory right of appropriating water from the

(1) [1902] 2 K. B. 597. (2) [1893] A. C. 562, 592, 593.

H. L. (E.) 1915 METROPOLITAN WATER BOARD v. CHERTSEY ASSESSMENT COMMITTEE.

Thames by that means and to the special fitness of the land for the purposes of the Water Board was rightly rejected by the quarter sessions. *New River Co.* v. *Hertford Union* (1), unless distinguishable, was wrongly decided; for, first, the statutory right of the Water Board is a personal right which does not flow out of the occupation of the land and cannot affect its value, and, secondly, any enhancement of value arising from the special adaptability of the land for its present use has already been included in the price paid for the land, and to add that enhanced value to the percentages charged on the cost of the land and buildings would be rating it twice over. [They also referred to *Liverpool Corporation* v. *Llanfyllin Assessment Committee* (2); *Rex* v. *New River Co.* (3); *Reg.* v. *Mile End Old Town Overseers* (4); *Reg.* v. *West Middlesex Waterworks Co.* (5); *Cedars Rapids Manufacturing and Power Co.* v. *Lacoste.* (6)]

Ernest Page, K.C., and *W. W. Mackenzie, K.C.* (with them *Lawrence Tooth* (for *H. Conacher*, serving with His Majesty's Forces)), for the respondents, were stopped on the question of the rate of interest.

Upon the main question this case is indistinguishable from *New River Co.* v. *Hertford Union.* (1) What was bought was land of no special value, but what is valued is the land with the intake and pumping station thereon, and that is valuable to the Water Board because it enables them to carry on a profitable business. This is not analogous to the case of sewage works, where the value taken is the value of the land plus the cost of the buildings and machinery, because water is a mercantile product. There is no foundation in principle for distinguishing between directly and indirectly productive parts of a water undertaking, and it is to remedy the injustice of that division that some enhancement of value is to be attributed to the intake. The "special fitness" referred to by Collins M.R. in the *Hertford Case* (1) in this connection includes the statutory right of the Water Board to use this land for a special purpose. The principle that the enhanced value due

(1) [1902] 2 K. B. 597.
(2) (1898) 78 L. T. 835, 839; reversed [1899] 2 Q. B. 14.
(3) (1813) 1 M. & S. 503.
(4) (1847) 10 Q. B. 208.
(5) (1859) 1 E. & E. 716.
(6) [1914] A. C. 569.

to the capacity of the land and buildings for use as a waterworks undertaking is an element to be taken into account in rating the property is established by a long series of authorities: *Rex* v. *New River Co.* (1); *Reg.* v. *West Middlesex Waterworks Co.* (2); *Sheffield United Gas Light Co.* v. *Sheffield Overseers* (3); *Reg.* v. *Eastern Counties Ry. Co.* (4); *Talargoch Lead Mining Co.* v. *St. Asaph Union* (5); *In re Lucas and Chesterfield Gas and Water Board.* (6) *Ryde, K.C.*, replied.

The House took time for consideration.

Dec. 9. EARL LOREBURN. My Lords, in this case quarter sessions have fixed, subject to a special case, the assessment of a strip of land some nine acres in extent, belonging to the Metropolitan Water Board, and comprising an intake from the river Thames, together with buildings and works; the abstraction of water being authorized by an Act of Parliament for the benefit of the Water Board. It is an unproductive part of a great profit-earning concern, which earns its profits in many parishes.

Both the assessment committee and the Water Board contended, and quarter sessions held, that the proper basis of assessment was to take the cost paid for the land and for erecting the buildings and works some years ago, and then to take a percentage upon that cost in order to arrive at annual value. But the assessment committee contended that "there should be added a further sum as being an enhanced value in respect of the user made of the intake, and the statutory right of appropriating water drawn from the river Thames by means thereof, and the proximity to the river for taking water from the river into the said aqueduct or canal to the Water Board's pumping tanks, and that the said piece of land in question had an added value by reason of its special fitness for this purpose. They contended that the aggregate of such percentage and enhanced value was the rent at which the premises might reasonably be expected to let from year to year, and they relied on the case of *New River Co.* v. *Hertford Union.*" (7) Such

(1) 1 M. & S. 503, 512.
(2) 1 E. & E. 716, 719.
(3) (1863) 4 B. & S. 135, 147.
(4) (1863) 4 B. & S. 58, 65.
(5) (1868) L. R. 3 Q. B. 478.
(6) [1909] 1 K. B. 16.
(7) [1902] 2 K. B. 597.

H. L. (E.) 1915

METROPOLITAN WATER BOARD v. CHERTSEY ASSESSMENT COMMITTEE.

Earl Loreburn.

was their argument here and below. It was a heterogeneous mixture of arguments.

On the other hand, the Water Board contended that no such addition should be made because all the elements of the supposed enhanced value that were relevant had been already covered by the price or cost. And they further contended that as they were themselves the only possible tenants of these premises and stood in very good credit, being able to borrow at 3½ per cent., the rent of the hypothetical tenant should be fixed, in view of their financial credit, at 3½ per cent. on the cost of the land and the works. It was put on their behalf in this way: If we do not get a low rent we are in a position to borrow money at a low rate and can build other waterworks for ourselves, and the interest on our outlay would be less than the rent you ask to have fixed.

Quarter sessions rejected both the appellants' and the respondents' contentions. I will not enter upon the question whether or not their decision on such matters is sufficiently precise, for that was not treated as the real point in argument. I prefer to say that I think quarter sessions were perfectly right in their conclusions and could not on the facts have decided otherwise.

The statutory test of what a hypothetical tenant might reasonably be expected to give as rent must always govern us, however difficult its application may be. And though rules of thumb, arising from the difficulty of supposing that a tenant could be found, when in truth he could not be found, for what nevertheless must be rated, have been suggested by experience and allowed by Courts of law, yet a Court will disallow any such rule if it be such, or so applied, as to rate something twice or to rate something which is not rateable or exempt something which is rateable. Such a rule is useful and is used to get at what the Act prescribes as near as may be.

When cost is taken as a basis it must surely be on the footing that what has in fact been paid presumably indicates capital value, and that interest on it presumably indicates annual value. When a man pays a price for the fee simple of land, whatever fitness or capability for profitable use then existed in the land, or may run with it, is surely covered by the price he pays, unless some special arrangement is made, of which there is no trace here.

When these parties accepted cost price of some years ago as the

basis, they might reserve a right to say that the land had become saleable for more money now by reason of a rise in prices or by reason of minerals having been found on it, if such had been the case, or of something else inherent in the land itself. But how could they say that something should be added either to the capital value or the annual value by reason of such things as its proximity to the river or its special fitness for some industrial purpose? All this had been included in the cost price. Or why should anything be added "in respect of the user made of the intake," a phrase of which I do not grasp the meaning, beyond seeing clearly that this is not a rateable subject at all? Or how can it be said that anything should be added because the person who bought the land or who now owns it has a statutory right, personal to himself, of using it in a particular way, and drawing water through it from the Thames? For that does not make the land itself more valuable. It only makes the owner or occupier of it more able to make profits. You might as well say that a piece of land is more valuable because the tenant of it has a valuable patent which he works on the land.

In the same way it might appear, and might be relevant, that buildings and works of this character are more valuable now because they are more in demand and would cost more to erect; but it cannot be relevant to say that something should be added to the cost, which you have taken as the basis, because water is taken in here which is sold at a profit somewhere else. That would be mixing up the cost basis with something like the profit basis applied in the case of railways. The *Hertford Case* (1) was cited to us. I do not think it meant what it was argued to mean, though there are some expressions in the judgment which go farther than I could follow. If the *Hertford Case* (1) is an authority for the contentions I have been dealing with, then I must respectfully express my dissent from that decision.

I come now to the claim of the Water Board, that the hypothetical rent should be fixed at a lower figure because they were the only possible tenants and could borrow at less than the current rate of interest. This singular argument had been properly refuted in the assessment committee's case, but Mr. Page on their behalf

(1) [1902] 2 K. B. 597.

H. L. (E.) 1915

METROPOLITAN WATER BOARD v. CHERTSEY ASSESSMENT COMMITTEE.

Earl Loreburn.

threw that over, and, if I understood him aright, accepted the proposition that the financial standing of the Water Board was a proper element for consideration. I suppose there must be some practice for taking that into account. If so, it is quite wrong. If you may regard the wealth of the possible tenant you must also regard the wealth of the possible imaginary landlord, for the one is as relevant as the other in any conjecture as to the rent that would result from bargaining between the two. It is bad enough to be obliged to fix a hypothetical rent between an imaginary landlord and an imaginary tenant for premises which no one would really hire for a year. It would be desperate if we are also to estimate the outcome of bargaining between one unknown person of unknown means and another person of large resources whom you suppose to be the only available tenant.

In the calculation imposed on us by the Act of Parliament we are dealing with fictitious persons and with things that can never happen. A piece of reality like the balance at the bank of the person supposed to be the tenant (but who, in fact, is the owner) has no place in such a calculation. Fact is good and fiction may be useful, but a mixture of the two is hopeless.

A further objection to the Water Board's contention is this: If in estimating the rent which might be expected you may regard the financial position of the real person whom you assume to be the tenant, then the rent must shift up or down according as that person becomes richer or poorer year by year. I add that it must also shift as the imaginary landlord becomes richer or poorer. No one could have thought of such a proposition were it not that valuers are hard put to it by no fault of their own, and that fallacies flourish in a region of fancy.

I think this appeal should be allowed, but as both sides have advanced untenable contentions, I move that the order of quarter sessions be restored and that there be no costs here or below on either side. I desire to add that the argument in the Court of Appeal appears to have proceeded, as the judgments proceeded, mainly upon the question whether or not quarter sessions had definitely decided on the different contentions submitted to them. Before your Lordships the merits of those contentions were exhaustively examined, and I think it is now clear that there can be only

one answer on the law. I do not find in the judgments of the Lords Justices any expressions of opinion adverse to the view of the law which I take.

LORD ATKINSON. My Lords, the facts in this case have been, already, fully stated. The point in controversy is the rule or principle to be adopted in valuing, for rating purposes, certain indirectly productive portions of the appellants' waterworks. This resolves itself into the determination of the reasonable rent which a hypothetical tenant would be willing to pay for these works as tenant from year to year subject to the statutory conditions. The principle to be applied in cases such as the present has been well established since the year 1847, when the case of *Reg.* v. *Mile End Old Town Overseers* (1) was decided. In that case the appointed arbitrator had found that the rateable value of the portion of the defendants' works indirectly productive, such as reservoirs, buildings, &c., might be taken as their value as land and buildings deriving additional value from "their capacity of being applied to the objects of a water company." This capacity is some inherent quality of the physical thing itself, its fitness to be devoted to a certain purpose, irrespective altogether of the value of its actual user for that purpose.

In *Reg.* v. *West Middlesex Waterworks Co.* (2) Wightman J., in delivering the judgment of the Court, speaking of the indirectly productive works of the defendants, said: "To the second question, requiring the principle to be stated on which the company is to be rated in respect of their plant, engine houses, cottages, buildings, wharfs, mains, land, and premises, we answer, in the words of the *Mile End Old Town Case* (1), that it is to be rated as for mere land and buildings, with fixtures and machinery attached, and deriving some additional value from their capacity of being applied to such purposes as that of a water company; and, we add, such additional value is derived from an increase of demand beyond supply, according to the principle regulating exchnageable value and not by reference to receipts earned in another parish, beyond assuming that they are sufficient to pay for all outgoings, including profits on capital."

(1) 10 Q. B. 208. (2) 1 E. & E. 716, 721.

H. L. (E.) 1915

METROPOLITAN WATER BOARD v. CHERTSEY ASSESSMENT COMMITTEE.

Lord Atkinson.

In *Sheffield United Gas Light Co.* v. *Sheffield Overseers* (1) Blackburn J., speaking of the indirectly productive portion of the company's works, said: "The principle on which the stations, works, buildings, &c., are to be valued, as laid down in *Reg.* v. *Mile End Old Town Overseers* (2) and *Reg.* v. *West Middlesex Waterworks Co.* (3), is, that they are to be valued as fixed property, deriving some additional value from their capacity of being used as part of the gasworks, a rule which in practice it is found not difficult to apply, though it is not theoretically very definite. We mention this because, if we understand the appellants correctly, they contend for a different principle."

In the case of *Liverpool Corporation* v. *Llanfyllin Assessment Committee* (4) the decision in *Reg.* v. *West Middlesex Waterworks Co.* (3) was approved of. Again, in *In re Lucas and Chesterfield Gas and Water Board* (5) and *Cedars Rapids Manufacturing and Power Co.* v. *Lacoste* (6) it is laid down that where land is acquired compulsorily for any particular purpose the special fitness of the land for that particular purpose is the thing which is to be taken into consideration to enhance its value. I use the words "enhance its value" advisedly, as I think no little confusion of thought is caused by the use of the words "added value" or "additional value," as if this "added value" was the value of something external to the land itself, and not of something inherent in the land itself, one of its capacities.

The contention of the respondents is that it is not merely the adaptability of the land for the purposes to which the appellants or their predecessors were empowered by statute to devote it which is to be taken into account, but the actual use of it when acquired and devoted to that purpose, almost as if their statutory powers, when put in action, were a rateable hereditament.

The value of the user of the lands for the purpose authorized might be enormous. It might be estimated by the profits made by the sale of the water taken into their reservoirs and distributed in altogether different taxable areas. And it would appear to me that the struggle of the respondents in the present case is, in fact, a

(1) 4 B. & S. 135, 147.
(2) 10 Q. B. 208.
(3) 1 E. & E. 716
(4) [1899] 2 Q. B. 14.
(5) [1909] 1 K. B. 16.
(6) [1914] A. C. 569.

struggle to get these works valued to some extent on the basis of receipts or profits made in a parish or parishes different from that in which the works to be valued are situated.

It is urged on behalf of the respondents that the decision of the Court of Appeal in the case of *New River Co.* v. *Hertford Union* (1) is an authority in support of their contention, and much time was spent in the minute criticism of the judgment delivered by the Master of the Rolls in that case. If this be so, the decision is entirely out of harmony with a current of authority extending from the year 1847 down to the year 1914, and as the case is not a binding authority on this House, I would for myself say unhesitatingly that I decline to follow it; but it is perfectly plain to me that, correctly understood, the case is in entire harmony with the weighty authorities which preceded it, and gives no support whatever to the respondents' contention.

No doubt, in the language employed by the learned Lords Justices, the distinction between the actual use and fitness for that use is not steadily kept in view, but the conclusion to which the reasoning of the judgment of the then Master of the Rolls leads up is succinctly stated by him at the end of his judgment in these words: "I think the standard of structural value is not the true one to apply to such a case. There is an added element of value in this case by reason of the special fitness of the land for a particular profitable purpose."

That statement of the law is entirely consistent with the earlier authorities, and it is clear, I think, that the learned Master of the Rolls never intended to cover by the words "special fitness" the actual user of the land or works for the authorized purposes. It is only necessary to examine the facts of the case to see that this is so. The entire property of the company in the parish, in that case, had up to the month of January, 1900, been assessed at no more than 650*l.* rateable value, which was a certain percentage on the cost of the site and of the construction of the buildings upon it. In that month a sum of 3180*l.* was added to the rateable value of the property under an entry described as "Intake from river Lea."

The company appealed to the quarter sessions against the rate

(1) [1902] 2 K. B. 597, 611.

H. L. (E.) 1915

METROPOLITAN WATER BOARD v. CHERTSEY ASSESSMENT COMMITTEE.

Lord Atkinson.

struck on this assessment. They contended that their property in the parish had, theretofore, been rated at 650*l.* per annum, and that no addition ought to be made to that assessment in respect of *the water flowing over the intake or in respect of the user of the intake by such water flowing over it.*

The respondents, on the other hand, contended that, beyond the rating of the intake at its structural value and value as land, it ought to be rated in an additional sum as having an enhanced value in respect of the user made of it in taking water from the river Lea into the channel of the appellants.

The quarter sessions dismissed the appeal, thus upholding the increased rating, but stated a case. The question for the Court was whether the hereditament was rateable on the principle contended for by the respondents. If so, the judgment was to stand; if not, then either the increased valuation was to be reduced to the original valuation of 650*l.* or the Court was to make such other order as it should think fit. The Divisional Court allowed the appeal, rejected the respondents' contention, and reduced the valuation to the original sum, 650*l.* (1) From this judgment the assessment committee appealed to the Court of Appeal. This latter Court did not at all uphold the decision of the Court of quarter sessions, or adopt the contention of the respondents. Quite the contrary. The Master of the Rolls (2) said: "The land which they" (the company) "occupy for the purpose of securing and passing the water into their system must have an added value by reason of its special fitness for this purpose." He said this was one of the commonplaces of rating law, was repeated in many cases, and was laid down in express terms in *Talargoch Mining Co.* v. *St. Asaph Union.* (3)

Now I turn to this last-named authority to see what was the commonplace of rating law which was laid down in it. The appellant company in that case were mine owners. For the purpose of working the machinery for their mine they diverted a stream from its natural course into another course, or channel, half a mile in length, part of which was open and part formed by pipes. The rateable value of the land of the new channel as agricultural land was 2*l.* The

(1) [1901] 2 K. B. 620. (2) [1902] 2 K. B. 608.
(3) L. R. 3 Q. B. 478, 486.

assessment committee, considering that the watercourse was enhanced in value by the water flowing over it, rated the two acres of land, the bed of the watercourse, at 100*l.*, which was the precise sum paid by the mine owner to the landlord for the flow of the water to the mine. The case came before the Court of Queen's Bench on a case stated, and the question for the Court's decision was whether the company were liable to be rated for the land over which the water flowed, and, if so, whether to the amount of the agricultural value of the land or to the amount of its enhanced value by reason of its being converted into a watercourse and applied to the purposes above set forth. In other words, whether the land was merely to be valued as agricultural land or as land enhanced in value by the use to which it was actually devoted. The Court held that the land of the watercourse covered with water was rateable, and that its value was increased by its capability of carrying water to the mine, but that if it was intended to rate it in respect of the 100*l.* paid annually, not for the land covered with water, but for the right to divert the water from its original course for the purpose of working the mine, that would not be a proper subject of a rate. Blackburn J. said if "by putting 100*l.* they have rated it according to the value that has been paid for the diversion of the water, ... they were applying a wrong principle."

This is the case upon which the Master of the Rolls based his judgment. It is a clear and emphatic authority that it is the adaptability, or special fitness, of a hereditament for the purpose to which it is to be put, and not its actual user for that purpose, that is to be taken into account as enhancing its value. The *Hertford Case* (1), therefore, so far from being an authority in favour of the respondents' contention, is, like every other case which has been cited, in truth and fact a direct authority against it. In my opinion the contention is hopelessly unsound.

In *Liverpool Corporation* v. *Llanfyllin Assessment Committee* (2) A. L. Smith L.J. is reported to have expressed himself thus: "Where no profits are earned in the parish by the use of the hereditament, a rough way of arriving at the rateable value . . . . is to see what the site and the construction of the works cost, and take a

(1) [1902] 2 K. B. 597. (2) [1899] 2 Q. B. 14, 20.

H. L. (E.) 1915

METROPOLITAN WATER BOARD v. CHERTSEY ASSESSMENT COMMITTEE.

Lord Atkinson.

percentage on the capital amount so expended as representing the rent which a tenant would give."

As appears by the sixteenth paragraph of the case stated, the present respondents gave evidence that this mode of arriving at the proper assessment of the appellants' land and works in the Chertsey Union should be adopted in the present case, with this addition, that to the amount of the percentage on this cost a further sum should be added in respect (1.) of the user made of the intake and the statutory right of drawing water from the Thames by means of it, and (2.) that the piece of land in question, the price paid for which was 4000*l.*, should have a special value added by reason of its fitness for this purpose. Whatever be the basis of calculation, the user of the intake and the statutory right to appropriate the water cannot be taken into consideration, as they are not things springing from the ownership of the land, but from the statute.

The second contention appears to me to confound the value of land as land and its structural value with the cost of acquiring it and the cost of the erection of buildings upon it. When a person purchases land he purchases with it all its capacities. If the vendor is aware that the purchaser desires to obtain it in order to devote it to a special purpose, and that it is specially fitted for that purpose, he presumably demands the more for it because of that special fitness, and the purchaser gives the more for it for the same reason. Its special fitness thus enhances the price for which it is sold and is paid for by the purchase-money.

There is no authority for the two propositions contended for. In my view they are quite untenable.

As far as the buildings are concerned, they were built for the very purposes of waterworks and nothing else. I presume the company did not deliberately build unsuitable works. A reservoir is, one might suppose, of little use for any purpose but for forming part of a waterworks system. The cost of construction covers the special fitness, and no increase is to be made in the rate of interest to be calculated upon that cost because of this fitness.

It only remains to deal with the appellants' contention touching the low rate of interest at which they can borrow.

It has been well established that the owners of great undertakings such as those of the appellants must, for the purpose of determining

the reasonable rent which a hypothetical tenant would be willing to pay for them, be considered as possible hypothetical tenants. The whole thing is, to use Lord Esher's words in *Reg.* v. *South Staffordshire Waterworks Co.* (1), "imaginary and unreal," but I think Lord Herschell rightly points out in the *Erith Case* (2) "that the rule of thumb of taking 5 per cent. on the cost, in the case of buildings, as a basis for arriving at the rental, may be all very well where the premises would be likely to find competing tenants, but it is not by any means necessarily applicable where it is thought that the owner would be likely to give a higher rental than any one else. It would often be obvious that he would never be willing to pay the rent arrived at in such a fashion, inasmuch as it would be more advantageous to him to become the owner. . . . . In all cases of the description of which I am speaking, the whole of the circumstances and conditions under which the owner has become the occupier must be taken into consideration, and no higher rent must be fixed as the basis of assessment than that which it is believed the owner would really be willing to pay for the occupation of the premises."

I thoroughly agree with every word of that passage. I think it is but common sense to suppose that a body with compulsory powers to acquire a piece of land would probably not be willing to pay a rent of 200*l.* per annum, for instance, for it when they could probably acquire the fee of it for, say 3500*l.*, 6*l.* per cent. upon which, 4 per cent. for interest and 2 per cent. towards forming a sinking fund, would only involve them in an annual expenditure of 210*l.* And artificial and unreal as these calculations are in the case of owners treated as possible hypothetical tenants, I do not suppose it is necessary altogether to banish common sense from them.

I think, then, it is perfectly legitimate to take into consideration the annual cost to which the owners would be put in acquiring the ownership of rateable hereditaments, as some guide, under the circumstances, as to what rent they would be willing to pay for them if they were not the owners. It is not at all conclusive, but merely an element to be considered.

Where I disagree with the contention of the appellants on this point is that you are, in ascertaining this annual cost, not to take into account the annual market value of the capital sunk in the

(1) (1885) 16 Q. B. D. 359, 367. (2) [1893] A. C. 562, 593.

H. L. (E.) 1915 METROPOLITAN WATER BOARD v. CHERTSEY ASSESSMENT COMMITTEE. Lord Atkinson.

acquisition of the hereditament, that is, the usual rate of interest, but merely the rate of interest at which the owner can procure that capital. Were this not so, a public body, to whom some generous benefactor made a present of money to enable them to acquire land compulsorily for some philanthropic object of which the donor approved, would presumably be unwilling to pay any rent for the enjoyment and occupation of the land, as they could acquire it, in fee, for, in effect, nothing.

Again, I am not quite certain that the Court of quarter sessions meant to rule, as a matter of law, that the low rate of interest at which the appellants could borrow was irrelevant. If they did so rule they were, I think, right, but if they only meant by the use of the words "should be taken" to state that they had come to that conclusion as a matter of fact, their finding is conclusive.

On the whole, therefore, I think the order appealed from, as well as the order of the King's Bench Division of May 12, 1914, were erroneous and should be set aside, and that the question set forth in the twenty-fourth paragraph of the case stated should be answered in the negative. Each party to abide their own costs other than in the Court of quarter sessions, whose order should be restored.

Lord Shaw of Dunfermline. My Lords, the results of this case may be very important, but I cannot see its importance in principle, except in relegating an alleged rule of law to the region of circumstance and fact, and so emptying it of real content as a rule.

This applies particularly to the first point raised. Two contentions with regard thereto were before the quarter sessions. The respondents said that the rent at which the intake, pumping station, and premises might be reasonably expected to let from year to year, that is, the rent payable by a hypothetical tenant, was two things, namely, first, 4 per cent. on the cost of the land and 5 per cent. on the cost of the buildings, and secondly, an added value in respect of "the user made of the intake and the statutory right of appropriating water"—I quote these crucial words—and proximity and "special fitness for this purpose"; that is to say, for the purpose of statutory user and appropriation. The value must—again to use their own words—be "an aggregate of such percentage

and enhanced value." Unless that was given, namely, a valuation consisting of (1.) percentages and (2.) added value, the quarter sessions were wrong in law.

I was particularly anxious during the discussion to see what this argument covered, and was much assisted by the extremely careful analysis and exposition of it by Mr. Mackenzie.

My Lords, land and buildings should be taken account of just as they are, to the eye of a hypothetical tenant—that is to say, with all their advantages, fitnesses, facilities, and capacities. That is the one cardinal rule of all valuation. To reach the figure representing that, the habit has sprung up, in the absence of a competitive actual rent, of reckoning the worth of the occupation to an owner who has bought and built for himself, and to do this by striking percentages upon land and buildings. There is nothing compulsory in this method; it is a convenient and practical plan of reaching reasonably what is aimed at, and in particular there is nothing whatsoever of a binding character in 4 or 5 per cent. respectively. If the circumstances of the case would point to a lower or a higher rate, such rate is not necessarily erroneous, or in violation of any legal principle.

Was this, then,—a valuation of the premises with all their advantages, fitnesses, facilities, and capacities—not enough in the present case? It was not, said the learned counsel for the respondents. Why? Because, they argued, in the present case something has got to be added to that value and to those elements, and that something springs from the privileged position, the user, and the right, created by Parliament, in the Metropolitan Water Board. I am of opinion that such an argument is radically unsound.

It may be true, my Lords, that land might have, from its local situation, the fair or possible chance of being made available for statutory purposes, and that, if promoters were shrewd and Parliament were compliant, the chance would be good; and if the portions of land available for the project were small, the chance would be very good. But, after some experience of such inquiries, I feel free to say that in ninety-nine cases out of one hundred this consideration appears in the capital account; it inflates the price. If it has so appeared, it would be a reduplication and a wrong to make an addition to a percentage on the enhanced price in respect of the same

H. L. (E.) 1915

METROPOLITAN WATER BOARD v. CHERTSEY ASSESSMENT COMMITTEE.

Lord Shaw of Dunfermline.

enhancement. This was exactly the contention of the appellants in the present case, who stated, inter alia, that they had paid 4000*l.* for under ten acres of bare land, and that "its capacity for use as an inlet was already covered by the price." That contention was specifically accepted by the quarter sessions: the opposite contention of the respondents as above explained was rejected. I am of opinion that in both respects the judgment of the quarter sessions was right.

I add, my Lords, that I know of no rule of law such as is argued for, and has been affirmed by the Court of Appeal, if the judgment of the learned judges be, as was contended, that in all cases two separate things must appear, namely, first, percentages, and next, what is called "added value." The term "added value" does appear in the judgments, but at least two of the learned judges show clearly that it may turn out that the elements which they have in view have been actually and already considered in the figure struck on percentages, and I agree with those learned judges that, if that were so, no further "addition" would have to be made.

There is no principle of law which compels the separate statement of an added value; all that is required is that the valuing authority has taken into account the enhancement arising from the advantages, fitnesses, facilities, and capacities to which I have referred. Finally, on this head, I cannot assent to the addition to all these elements of a figure representing the element of personal privilege, or of statutory right in a particular undertaking.

For myself I do not read the *Hertford Case* (1) as in conflict with these views; if it be so, I humbly think it a wrong decision. But the judgment of Lord Collins shows in more than one passage that the "added value"—an unfortunate phrase which, having his high sanction, has had unfortunate results—was in his view, and even in his own words, the equivalent of enhancement or "element of value." And it was because, in the opinion of the Court of Appeal, that element had been omitted, and a percentage had been struck merely on the value of land as bare land, that it was necessary to add something to that by supplying an element which had been erroneously left out. That, in my judgment, was the true meaning

(1) [1902] 2 K. B. 597.

of the *Hertford Case* (1), and it is only if it means that that it can remain of standing authority.

In the present case this element of value has not been left out. It has been considered and taken into account; and the acceptance of the appellants' contention was on that footing, and that footing alone.

The second part of the case consists of an endeavour by the Water Board to have a lower percentage or value struck by reason of their facilities for cheap borrowing. This is directly opposed to their objection already dealt with, which eliminated the element of private or statutory right; the present argument being that here, for the purpose of lowering the valuation, the element of private or statutory power should be reckoned in. I cannot believe it possible that this value—which after all is a value of hereditaments—can be affected or was ever meant to be affected for such a reason. It would lead to startling results. A clever financier could show the valuation authority that he could borrow money on easier terms than his neighbours, and therefore—so it would be argued—the rateable value of his land had gone down. This advantage would be countered by the disadvantage of the poorer owner of a similar plot; and the heavier the latter's burden of interest, the higher would be the value of his landed property and the heavier his annual rateability. This is unarguable, and I need only add that a further startling result would follow—that when the terms of public loans became more onerous the rateable value of hereditaments would be increased. Such are the dangers of confusing personal advantages with those inherent in the land.

I agree with the judgment proposed.

LORD PARKER OF WADDINGTON. (2) My Lords, the problem in all rating cases is to ascertain the rent which a tenant might be fairly expected to pay by the year for the privilege of occupying the hereditaments the subject of the assessment. In some cases this problem may be easy of solution, but in others, where the property consists of parts only of an undertaking, such as a railway or water or gas undertaking, it is extremely hard to solve. The Courts have, however, from time to time laid down, or

(1) [1902] 2 K. B. 597. (2) Read by Lord Shaw of Dunfermline.

H. L. (E.) 1915

METROPOLITAN WATER BOARD v. CHERTSEY ASSESSMENT COMMITTEE.

Lord Parker of Waddington.

approved, certain empirical rules to be applied to various classes of case.

With regard to water undertakings the practice has been to classify the various hereditaments which, though part of a single undertaking, have to be rated separately in the several parishes where they are situate as either directly or indirectly productive of profit. Those which are only indirectly productive of profit have been generally assessed according to the following rule: The assessment authority has taken 4 per cent. on the price which the company paid for the land, and 5 per cent. on the cost incurred by the company in erecting the buildings or works on the land, and has treated these percentages as a measure of the rent which the hypothetical tenant would be willing to pay. The origin of this rule is not very clear, but it may, I think, be explained as follows: In considering what the hypothetical tenant will pay by way of rent the company itself cannot be excluded as a possible tenant. If there are possible tenants other than the company, the annual rent may be estimated on a competitive basis, but if, as is generally the case, the company is the only possible person who would be likely to give any rent at all for the property, the competitive basis is excluded. In such cases, if the company is in fact paying any rent for the hereditaments in question, such rent is evidence of what the company would be willing to pay. If the company is owner as well as occupier, then, inasmuch as it is by reason of its occupation out of pocket to the extent, at least, of interest on its capital expenditure in acquiring and building on the land it occupies, the amount of such interest is good evidence of what the company would be willing to pay by the year for the privilege of continuing its occupation. In making the calculation interest at 4 per cent. has always been allowed in respect of the cost of the land and 5 per cent. in respect of the cost of the building, the extra 1 per cent. in the latter case representing the annual cost of keeping the building in repair. In the case of fixed machinery more than 5 per cent. is sometimes allowed, the cost of repairing machinery being greater than the cost of repairing buildings. The rule may be similarly explained if it be considered as incident to the application of what is called the "contractor's test." Clearly the company would have to pay such a contractor interest on his capital expenditure

and something for keeping buildings and machinery in proper repair. The rule is so well established that, with respect to those parts of the water undertaking which are only indirectly productive of profit, though the assessing authority is not legally bound to apply it in all cases, the onus of showing that it ought not to be applied in any particular case probably lies with those who say it is inapplicable.

My Lords, it is to be observed that the annual rent thus ascertained is the annual rent which the company is notionally paying, or would have to pay, a contractor, and may, therefore, be considered as willing to pay for the hereditaments in question, including not only the land, but the buildings and fixed machinery on the land, together with the special fitness or adaptability of land, buildings, and machinery for the purposes for which they are used. It is in no sense the rent which the company would be willing to pay for land or buildings which had no such fitness or adaptability. No doubt in ascertaining the annual value of a hereditament, as indeed in ascertaining its capital value, it is necessary and proper to take into account its fitness or adaptability for every purpose for which it can legitimately be used, including the purpose for which it is actually used, but if such annual value be ascertained according to the rule we are considering, all elements of value arising from fitness or adaptability are already taken into account, and I cannot follow the argument that there remains anything to be added to the annual value so ascertained. Such cases as *Reg.* v. *West Middlesex Water Co.* (1), which was cited in support of some addition, do not appear to me to bear out the respondents' contention. They merely affirm the principle that in arriving at a rateable value you have to take into account any special fitness or adaptability of the hereditament the subject of valuation for the purpose for which it is used. They do not affirm that where you ascertain rateable value by means of the empirical rule in question you are to add anything to the cost of the land and buildings or to take a percentage on anything besides capital expenditure.

My Lords, I am inclined to think that there was a certain confusion of thought underlying the arguments addressed to your Lordships on behalf of the respondents. They spoke of " value as

(1) 1 E. & E. 716.

H. L. (E.) 1915

METROPOLITAN WATER BOARD v. CHERTSEY ASSESSMENT COMMITTEE.

Lord Parker of Waddington.

land" and "structural value," and submitted that total value, whether capital or annual, included a third element, namely, "fitness or adaptability for particular purposes." This third element was, they said, omitted in applying the percentage rule. But the rule has nothing to do with "value as land" or "structural value." It merely ascertains the annual value of the hereditament as a whole by reference to cost of land and cost of structure, a very different matter. It is only by identifying "cost of land" with "value as land" and "cost of structure" with "structural value" that any suggestion of an omitted element can possible arise. The rule does not proceed by way of ascertaining capital value and deducing annual value from capital value. Capital value and annual value for rating purposes are not comparable things, nor are cost and value comparable. Vacant land may be worth by the year little or nothing, though having a high value as building land. The cost of buying a plot of land and building a house on it may largely exceed the value of the land and the house when built. It would be absurd to maintain that the value of land and house must always be greater than the cost of land and house, because the house, when it had been built, was fit to live in.

My Lords, great stress was laid by the respondents' counsel on the *Hertford Case* (1), which they maintained was an authority to the effect that in applying the rule something must be added to "value as land" and "structural value." I confess I have been unable to follow the reasoning of the learned judges who decided the *Hertford Case* (1), but if and so far as it supports the proposition for which it is cited I cannot think it is good law. I am inclined to think that it is based on the same confusion of thought to which I have already referred.

My Lords, the order of the Divisional Court, approved by the Court of Appeal, in this case is open to the same criticism. It expresses an opinion that in assessing the rateable value of the hereditaments in question there is, in addition to structural value and value as land, an element of value to be taken into consideration by reason of, inter alia, its proximity to the river and its special fitness for the purposes therein mentioned. If this only means that in valuing a hereditament you must take into account its position

(1) [1902] 2 K. B. 597.

and its fitness or adaptability for all purposes for which it can be used, including that for which it is used, it is obviously correct, but taken in connection with this case its meaning really is that in applying the empirical rule you have to add something to the usual percentages on the cost of the land and of the structure, which, for the reasons I have stated, appears to me to be wrong.

My Lords, the order of the Divisional Court refers also to an additional element of value by reason of the "user" made of the intake and the statutory right of the appellants to take water from the river Thames by means thereof. In these respects also the order is, in my opinion, wrong. It is true that in the *Hertford Case* (1) Collins M.R. mentions the "user" of the hereditament in question as an element of value, but it appears that he employed this expression as meaning "fitness for the purpose for which the hereditament was actually used." In this sense the "user" can legitimately be taken into account as an element of value, but the fact that any particular use is made of a hereditament is not otherwise material to its value. Again, the right of the appellants to take water from the river Thames being a right in gross and not appurtenant to the land, or passing with the land to any owner or occupier thereof, cannot enhance the value of the land. I do not think that the *Hertford Case* (1), if it decides otherwise, can stand. So far as any statutory power of the appellants is relevant at all, it has already been taken into account in treating the appellants with their statutory powers as a possible tenant of the hereditament in question and proceeding to apply the rule on this footing. Moreover, even if either of these points were proper to be taken into account as a matter of valuation, this would be no reason for treating them as elements the value of which ought to be added when the annual value had been ascertained by an application of the rule.

My Lords, the only other point is whether the usual percentages on the cost of land and buildings ought to be reduced because the appellants are in a position to borrow money at a less rate of interest than an ordinary water company. I am of opinion that the answer to this question is in the negative. The appellants are out of pocket by reason of their occupation to the extent of the interest

(1) [1902] 2 K. B. 597.

H. L. (E.) 1915 — METROPOLITAN WATER BOARD v. CHERTSEY ASSESSMENT COMMITTEE.

they might otherwise have obtained for the money they have actually expended, and the rate of interest at which they might have borrowed this money is only material if it be desired to displace the rule, and in no way material in applying the rule, and both parties agreed that the rule was applicable.

My Lords, in my opinion the appeal ought to be allowed, and the order of quarter sessions ought to be restored.

Order of the Court of Appeal reversed and order of the Court of quarter sessions restored. Each party to bear their own costs in the King's Bench Division and in the Court of Appeal and also in this House.

Lords' Journals, December 9, 1915.

Solicitor for appellants: *Walter Moon.*

Solicitor for respondents: *Percy H. Webb, for Paine, Brettell & Porter, Chertsey.*

[HOUSE OF LORDS.]

H. L. (Sc.)* 1915 *Oct.* 18.

STEAMSHIP "BEECHGROVE" COMPANY, LIMITED . . . . . } APPELLANTS;

AND

AKTIESELSKABET "FJORD" OF KRISTIANIA . . . . . } RESPONDENTS.

Ship—Collision—Compulsory Pilot—Ship in Charge of Pilot outside Area of Compulsory Pilotage—Master and Servant—Merchant Shipping Act, 1894 (57 & 58 *Vict. c.* 60), *s.* 633—*Clyde Navigation Consolidation Act,* 1858 (21 & 22 *Vict. c. cxlix.*), *ss.* 75, 128, 134, 136.

The exemption from liability granted by s. 633 of the Merchant Shipping Act, 1894, in the case of compulsory pilotage is confined to the area in which the employment of a qualified pilot is compulsory by law and does not extend to the whole of a pilotage district which includes as part thereof an area of compulsory pilotage.

---

* *Present:* LORD BUCKMASTER L.C., LORD DUNEDIN, LORD ATKINSON, LORD SHAW OF DUNFERMLINE, LORD PARMOOR, and LORD WRENBURY.

General Steam Navigation Co. v. *British and Colonial Steam Navigation Co.* (1869) L. R. 4 Ex. 238 overruled on this point.

The Charlton (1895) 8 Asp. M. L. C. 29 overruled.

The Clyde Navigation (Consolidation) Act, 1858, makes pilotage compulsory within the area of the river Clyde and fixes the western or outward limit of that area some four miles above Greenock. The Clyde Pilot Board, which under the Act had the sole right of licensing pilots for the navigation of the river and Firth of Clyde, licensed river pilots to pilot vessels between Greenock and places in the river area, and by its by-laws made under the Act provided that such pilots should be remunerated for the whole distance between Greenock and Glasgow and that the pilot when on board should have sole charge of the vessel. The owners of an inward-bound vessel in charge of a pilot taken on board at Greenock pleaded compulsory pilotage as a defence to an action of damages arising out of a collision which took place off Greenock :—

Held—(1.) that the owners did not fall within the exemption granted by the Merchant Shipping Act, 1894 ; (2.), Lord Dunedin doubting, that, apart from the Act of 1894, the by-laws imposed no legal compulsion on the captain to resign the navigation into the hands of the pilot ; and that the plea was bad.

Decision of the First Division of the Court of Session in Scotland, 1915 S. C. 281, reversed.

APPEAL from an interlocutor of the First Division of the Court of Session in Scotland (1) recalling an interlocutor of the sheriff-substitute for Lanarkshire.

The appellants were the owners of the British steamship *Blaenavon*, and the respondents were the owners of the Norwegian steamship *Fjord*. The appellants brought an action for damages against the respondents in respect of a collision which occurred between the two vessels off Princes Pier, Greenock, on February 2, 1914, and there was a counter-claim by the respondents. The respondents pleaded inter alia as follows : "II. The navigation of defenders' vessel having been in charge of a pilot whose employment was compulsory within a pilotage district in the sense of the Merchant Shipping Act, 1894, the defenders are free from liability in respect of the said collision under section 633 of the said Act, and should be assoilzied, with expenses."

By the Clyde Navigation Consolidation Act, 1858 (21 & 22 Vict. c. cxlix.), s. 75, the limits of the river Clyde were defined to be the whole channel or waterway of the river forming the harbour of

(1) 1915 S. C. 281.

H. L. (Sc.) 1915

STEAMSHIP "BEECHGROVE" COMPANY, LIMITED v. AKTIESELSKABET "FJORD" OF KRISTIANIA.

Glasgow " and as far down the river as to a straight line drawn from the eastern end of Newark Castle on the south shore of the river to the mouth of Cardross Burn on the north shore of the river." The Firth of Clyde, as defined by the Act (s. 128), extended from the westward limit of the river to the island of Little Cumbrae. Newark Castle was some four miles above Greenock, and the island of Little Cumbrae was some sixteen miles beyond Greenock.

Sect. 119 empowered the trustees appointed by the Act to make by-laws for (among other purposes) regulating the conduct of the owners, masters, pilots, and crews of vessels propelled by steam on the river with regard to the mode of navigating such vessels. Sect. 128 provided for the appointment of a pilot board for licensing pilots for the safe conduct and navigation of vessels in the river and Firth of Clyde. Sect. 134 provided that the pilot board should have the exclusive right of licensing pilots within the statutory limits and empowered the board to make-by-laws for regulating the wages and allowances for pilotage and the conduct and behaviour of the pilots. Sect. 136 provided that it should not be lawful for any person to navigate without a licensed pilot any vessel exceeding sixty tons burden in any part of the river as defined by the Act and imposed a penalty of 5*l.* for every offence under the section. Sect. 139 authorized and required the pilot board to make by-laws for the purposes therein mentioned, which included the navigation of vessels plying between the western limits of the river and the island of Little Cumbrae, but did not include the navigation of vessels in the river.

It was agreed between the parties that the issue raised by the respondents' second plea should be tried as a preliminary question of law.

The facts in relation to this plea were as follows :—

At the time of the collision the *Blaenavon* was outward bound and had proceeded from Glasgow in charge of a pilot and was slowing down to put the pilot ashore at Greenock. The *Fjord* was inward bound for Glasgow and had just taken a pilot on board from the pilot station at Greenock, in accordance with the usual practice for inward-bound vessels, to take her up the river Clyde, and, although she had not reached the statutory limits of the river, the pilot was directing the navigation of the ship.

The by-laws enacted by the pilot board in 1859 in pursuance of the powers conferred on them by the Act, after reciting the limits of the river and Firth of Clyde as defined by the Act, provided (clause 18) that pilots should consist of two classes, namely, river pilots licensed to pilot vessels between Glasgow and Greenock, and deep sea pilots licensed to pilot vessels between Greenock and the island of Little Cumbrae, but in practice this distinction had not been strictly observed and the same men were licensed as pilots for both districts.

Clause 19: "No person shall presume to navigate or to act in piloting any ship or vessel whatever, exceeding sixty tons register, on any part of the river Clyde, other than the river pilots duly licensed by the board; under a penalty not exceeding five pounds for each offence, besides all damages and expenses." By clause 31 the river pilots were to reside at Glasgow and Greenock as the board might direct. By clause 33 all river pilots when booked must attend at their respective stations at Glasgow or Greenock during tide time.

Clause 37: "No pilot shall leave any vessel after being appointed to the charge, unless with the sanction of the pilot master, until such vessel be properly moored at her place of destination, under a penalty not exceeding five pounds, or the forfeiture of his licence in the option of the board; and the pilot, when on board, shall have sole charge of the vessel."

By a by-law fixing pilotage rates enacted in 1903 owners of vessels were compelled to pay their pilot for the whole distance from Glasgow to Greenock, and vice versa, and not merely for the distance included within the limits of the river as defined by s. 75 of the Clyde Navigation Act, 1858.

The sheriff-substitute was of opinion that the by-laws ought not to be construed as extending the area of the compulsory waters and that if so construed they were ultra vires, and, upon the construction of s. 633 of the Merchant Shipping Act, 1894, he held that the defence of compulsory pilotage was not open to the respondents. He therefore repelled the respondents' second plea and ordered that the case should go to trial upon the issue whether one or other or both of the ships were to blame.

The First Division reversed this decision by a majority (the Lord

H. L. (Sc.) 1915

STEAMSHIP "BEECHGROVE" COMPANY, LIMITED v. AKTIESELSKABET "FJORD" OF KRISTIANIA.

President and Lord Mackenzie, Lord Skerrington dissenting) upon the ground that the case was covered by *General Steam Navigation Co.* v. *British and Colonial Steam Navigation Co.* (1) and *The Charlton.* (2)

June 29; July 1. *R. S. Horne, K.C.*, and *James B. Paton* (both of the Scottish Bar), for the appellants. The question of the respondents' exemption from liability turns upon the construction of s. 633 of the Merchant Shipping Act, 1894. The accident occurred four miles beyond the limits of compulsory pilotage, as defined by the Clyde Navigation Act of 1858, while a pilot was in charge of the respondents' ship. It is submitted that the master was not bound to cede the charge of the ship until the compulsory limit was reached. It is immaterial to the question of exemption that the ship, in accordance with the usual practice, took the pilot on board at a point outside the compulsory area. The words of s. 633 of the Act of 1894, "any district where the employment of a qualified pilot is compulsory by law," have reference simply to the geographical limits of the compulsory area and cannot be construed, as the First Division have construed them, as meaning "any pilotage district which includes as a part thereof the compulsory area." So to construe the words might involve a very serious extension of the statutory exemption. The policy of the law as to the defence of compulsory pilotage has undergone a great change of recent years, as is shown by the Pilotage Act, 1913 (2 & 3 Geo. 5, c. 31). That Act is to be construed as one with the Merchant Shipping Act, 1894. It repeals all the provisions of the earlier Act as to pilotage, except s. 633, which is to remain in force till 1918, and substitutes other provisions therefor, and it was passed with a view of making this plea of compulsory pilotage, even while it lasts, as restrictive as possible: see s. 14. The difficulty has arisen from s. 128 of the Clyde Navigation Act of 1858, which provides for the appointment of a pilotage board for the regulation of the traffic not only in the river but also in the firth, and by the terms of the Act the board are authorized to make by-laws. But the area of compulsory pilotage is defined by the Act itself, and the board cannot extend that area.

(1) (1868) L. R. 3 Ex. 330; (1869) L. R. 4 Ex. 238.
(2) 8 Asp. M. L. C. 29.

The by-laws made by the board recite the limits of the river and firth as defined by the Act and expressly recognize the statutory limits of compulsory pilotage. They do not purport to extend those limits, and if they did they would be ultra vires. The construction placed by the First Division upon s. 633 of the Merchant Shipping Act, 1894, is founded upon two English authorities—*General Steam Navigation Co.* v. *British and Colonial Steam Navigation Co.* (1) and *The Charlton* (2)—which were decisions upon the corresponding section (s. 388) of the Merchant Shipping Act, 1854. In the former case the Court of Exchequer purported to follow *Lucey* v. *Ingram* (3) and doubted *The Stettin* (4), which was supposed to be inconsistent with it. But neither of those cases affects the question. *Lucey* v. *Ingram* (3), as explained by Lord Romilly in *The Lion* (5), was a decision upon a special statutory exemption which depended not upon compulsory pilotage but upon the right to demand a pilot, and in *The Stettin* (4) it does not clearly appear from the report that the vessel was ever bound to take a pilot. The Court of Exchequer Chamber, in affirming the decision of the Court of Exchequer, found as a fact that at the time of the collision the vessel was in compulsory waters, but, alternatively, assuming that that finding was erroneous, they concurred in the construction put upon the Act by the Court below. That decision was followed by the Court of Appeal in *The Charlton.* (2) But, first, those cases are distinguishable in their facts from the present, for they were both cases in which the pilot was taken on board within the compulsory area but had remained on board after the compulsory area was passed—there is no authority dealing with the case of a pilot being taken on board outside the compulsory area—and, secondly, they were wrongly decided and are contrary to the plain language of the Act. This statutory exemption from liability does not depend upon any express or implied agreement between the master and the pilot or upon any theory of the relationship existing between them, or of the change in that relationship as is suggested by Lord Esher in *The Charlton* (2), but depends simply

(1) L. R. 3 Ex. 330; L. R. 4 Ex. 238.
(2) 8 Asp. M. L. C. 29.
(3) (1840) 6 M. & W. 302.
(4) (1863) Br. & Lush. 199.
(5) (1869) L. R. 2 P. C. 525, 532.

H. L. (Sc.) 1915

STEAMSHIP "BEECHGROVE" COMPANY, LIMITED v. AKTIESELSKABET "FJORD" OF KRISTIANIA.

upon the question whether the ship was at the time within the compulsory area. It is for those who claim exemption from the common law liability to bring themselves within the terms of the statute: *Clyde Navigation Co.* v. *Barclay.* (1) The First Division have apparently sought to invoke some principle of common law in aid of the statute, but the statute is really declaratory of the common law, and so far as any difference exists between the two the statute is to prevail. [They also referred to Bell's Commentaries (M'Laren's edition), vol. 1, p. 599, and to *The Annapolis.* (2)]

Frederick Laing, *K.C.*, and *Norman Raeburn*, for the respondents. 1. As to the statute: The respondents are compelled to take a pilot within the river limits, and the only way in which they can do that is in the manner provided by the by-laws. It cannot be said that the by-laws are unreasonable. The pilot must be taken on board within the district for which he is qualified and over which he is employed. If the only way of obeying the statute is by obeying the by-laws properly made the compulsion exists from the moment the pilot is on board. The master cannot take the pilot at the precise point where the river ends because he cannot get him. The Legislature recognized that there were a number of these pilotage districts, part of which were compulsory and part free, that pilots could only be picked up at certain points, and that there might be a difficulty in ascertaining the exact limits of the compulsory area, and s. 388 of the Act of 1854, of which s. 633 of the Act of 1894 is a repetition, was enacted to get rid of those difficulties and meant that compulsion should exist within any pilotage district in which there was a compulsory area. The section was an extension of the common law doctrine and said it was not necessary that the ship should be in the area in which the employment of a pilot was compulsory, but only that she should be in the pilotage district in which that area exists. It is said that the Pilotage Act of 1913 shows that this construction is wrong. The objects of that Act are two-fold: (1.) to secure uniformity in pilotage regulations, and (2.) to get rid of compulsory pilotage altogether, in order to bring the law of England into line with the laws of other nations. Sect. 14 deals only with pilotage orders which are a creation of that Act, and no

(1) (1876) 1 App. Cas. 790, 795, 796.

(2) (1861) Lush. 295, 312.

argument can be founded on that section against the respondents in regard to the construction of the Act of 1894. The construction contended for by the respondents was adopted in two cases of high authority and long standing—*General Steam Navigation Co.* v. *British and Colonial Steam Navigation Co.* (1) and *The Charlton* (2)—in regard to the Act of 1854. They introduced a very serious qualification into the Act, yet when the Act was re-enacted in 1894 no alteration was made in the language. The construction adopted by the Courts must therefore be taken to have had the sanction of the Legislature. That construction has stood unchallenged for a great number of years and it ought not now to be disturbed. For the purposes of the construction of the statute there is no difference between an inward and an outward bound vessel.

2. As to the common law: The pilot was in charge in such circumstances that he never became the servant of the owner so as to bind him. In order to make the owner liable the employment and the payment of the pilot must be voluntary. The pilot was compelled to come on board at a point beyond the line defining the limits of the river and was compelled to take charge, and it follows that the owner must be compelled to give the charge to him. Taking the statute and the by-laws together, the respondents were compelled by law to take a pilot on board before the ship reached the line: *The Ruby.* (3)

R. S. Horne, K.C., in reply. *The Ruby* (3) is distinguishable because in that case the by-laws which had been made under an earlier Act were expressly sanctioned by the later Act.

The House took time for consideration.

Oct. 18. LORD BUCKMASTER L.C. My Lords, on February 2, 1914, the steamship *Blaenavon* left the port of Glasgow and sailed down the river Clyde on an outward voyage. She reached Greenock, which is outside the statutory limits of the river, at about 6 P.M. At the same time the steamship *Fjord* was sailing up the Firth of Clyde to Glasgow, and a collision occurred between the two vessels outside Princes Pier. The owners of the *Blaenavon* blamed the

(1) L. R. 3 Ex. 330; L. R. 4 Ex. 238. (2) 8 Asp. M. L. C. 29.
(3) (1890) 6 Asp. M. L. C. 577.

H. L. (Sc.)
1915
STEAMSHIP "BEECHGROVE" COMPANY, LIMITED v. AKTIESELSKABET "FJORD" OF KRISTIANIA.
Lord Buckmaster L.C.

Fjord for the accident and instituted the proceedings out of which this appeal has arisen for the purpose of recovering compensation for the damage that they suffered.

The actual question who was to blame for this misadventure is not before your Lordships' House, for, in answer to the condescendence for the pursuers, the defenders raised certain pleas in law, of which for the present purpose the second is alone material. It is in the following terms: "II. The navigation of defenders' vessel having been in charge of a pilot whose employment was compulsory within a pilotage district in the sense of the Merchant Shipping Act, 1894, the defenders are free from liability in respect of said collision under section 633 of the said Act, and should be assoilzied, with expenses."

The record being closed, the parties were heard on the points of law so raised; and on July 11, 1914, the sheriff-substitute, by an interlocutor of that date, repelled the second plea to which I have referred. On appeal from this decision, their Lordships of the First Division recalled the interlocutor of the sheriff-substitute and remitted the cause to him to allow proof. From this interlocutor the present appeal has been brought before your Lordships' House.

There is no point for your Lordships' decision except the bare question of law raised by the second plea of the defenders, but this is of some difficulty, and in order to make plain the exact circumstances under which it has arisen it is necessary to state at some length the provisions of the various Acts of Parliament the interpretation of which is the main subject for your Lordships' consideration.

By the Clyde Navigation Act of 1858 provisions were established to secure the proper navigation of the river and the Firth of Clyde. By s. 75 the limits of the river were defined as including the whole channel or waterway of the said river down to a straight line drawn from the eastern end at Newark Castle, on the south shore of the said river, to the mouth of Cardross Burn, on the north shore. By s. 128 a pilot board was appointed for licensing pilots in both the river and the firth within a straight line drawn due east and west from the southernmost point of the island of Little Cumbrae, this island being some twenty miles further down the river than the western limits fixed by s. 75. By s. 134 the pilot board, established

for licensing pilots, was declared to have the exclusive right of granting such licences to pilots for the navigation of vessels in the river and the firth within the said limits. It should be observed that by these sections there is no distinction established between the pilotage for the river and the pilotage outside the river, for the whole of the pilots are equally under the same jurisdiction throughout the whole length of the river and the firth up to the island of Little Cumbrae. By s. 136, however, the statute imposes certain definite restrictions upon the navigation of vessels; and, as much of the present dispute depends upon the effect of this section, it is as well to state its actual terms. They are as follows: "It shall not be lawful for any person to navigate without a pilot, nor for any person, except the pilots licensed by the existing pilotage authorities, or by the pilot board, as herein-before provided, to act in piloting any vessel exceeding sixty tons burden in any part of the river as defined by this Act, and every person navigating or piloting, or attempting to navigate or pilot any vessel exceeding the said burden in any part of the river without being so licensed, shall for every such offence be liable to a penalty not exceeding five pounds."

Sect. 139 of the Act proceeded further, and granted powers to the pilot board, and, indeed, required them, to make by-laws and regulations for the proper navigation of all vessels between the western limits of the river and the island of Little Cumbrae, and also for regulating the conduct of the master, pilots, and crews of such vessels. By-laws were accordingly enacted, and by these by-laws the pilots were divided into two classes—the river pilots, who were licensed to pilot vessels between Glasgow and Greenock, and the deep sea pilots, who were licensed to pilot them between Greenock and the island of Little Cumbrae. It should be observed that the dividing line which separated the one class from the other was not the same as that which divided the river from the Firth of Clyde, but was some four miles on the western side of the river boundary. By-law 19 prohibited any person from navigating any ship on any part of the river other than the river pilots; this is the only by-law which imposes a penalty for not using the services of a pilot, and it is in the following terms: "No person shall presume to navigate or to act in piloting any ship or vessel whatever exceeding sixty tons register on any part of the river Clyde other than the

H. L. (Sc.) 1915

STEAMSHIP "BEECH-GROVE" COMPANY, LIMITED v. AKTIESEL-SKABET "FJORD" OF KRISTIANIA.

Lord Buckmaster L.C.

river pilots duly licensed by the board under a penalty not exceeding five pounds for each offence besides all damages and expenses." By-law 31 compelled the pilots to reside at Glasgow or Greenock. And by-law 37 enacted that pilots, when on board, should have sole charge of the vessel. Rates were also fixed by these by-laws, and these rates were arranged between Glasgow and Greenock and were in no way regulated by the river boundary.

In the present case the *Fjord*, being bound for Glasgow, picked up her pilot at Greenock. It was the only place where the pilot could be obtained, and the pilot, when he came on board, took charge of the vessel and was, in fact, navigating her at the time of the accident.

The *Blaenavon*, on the other hand, had taken her pilot on board at Glasgow and had not exchanged him at Greenock for a deep sea pilot at the time of the accident. It might be that the pilot held both licences, in which case it would not be necessary that he should be changed.

The position of the vessels, therefore, was this: They were outside the limits of the river, and outside the area within which it was not lawful, according to the terms of the statute, to navigate without a pilot. The *Fjord* had had no opportunity of obtaining a pilot anywhere except at the spot where he had been taken on board, and being on board, the by-laws provided that he was bound to have charge of the vessel.

Now, by s. 633 of the Merchant Shipping Act of 1894 it is enacted that the owner or master of a ship shall not be answerable to any person whatever for any loss or damage occasioned by the fault or incapacity of any qualified pilot acting in charge of that ship within any district where the employment of a qualified pilot is compulsory by law.

The first question, therefore, is, was the spot where the accident occurred, although outside the western limits of the river, a spot where pilotage was compulsory by law? So far as the terms of the statute of 1858 are concerned, I am clearly of opinion that it was not. That Act gave a perfectly plain definition of the area within which it was unlawful to navigate without a pilot, and the only way of escaping from that difficulty is by deciding that the word "district" in the Merchant Shipping Act of 1894 covers an area wider than that defined by the statute of 1858, and includes at least a

convenient place for taking up and discharging a pilot outside the limits of the river and possibly also the whole area down to Little Cumbrae.

I am unable to accede to this contention. I cannot think that the word "district" in the Act of Parliament was intended to mean neighbourhood or to possess so vague and indefinite a meaning as must necessarily be attributed to it if once the actual statutory and defined limits are exceeded.

Several authorities, however, were quoted to your Lordships to support an extended meaning of the word, and they need careful examination. It is, of course, possible to avoid their effect by saying that this case has arisen in Scotland and these decisions are all decisions of the English Courts. In my opinion, your Lordships ought not to take that course. The Act of Parliament which is the subject of construction applies to Scotland as well as to England. There is nothing in any of the circumstances of this case which requires the application of local custom or local law; and it seems to me unconvincing to decide this question on any considerations that would not be just as applicable to a collision that had taken place under similar conditions in the mouth of the river Thames. I realize that this imposes upon your Lordships the duty, if your view of the section be the same as that which I have expressed, of destroying the authority of two at least of the English cases which were the subject of decision by numerous and eminent judges. I feel the full force of this objection, but I am unable myself to follow the reasoning on which those judgments were based, and it is my view that they reached a wrong conclusion.

The first case to which reference was made was *Lucey* v. *Ingram*. (1) In that case a vessel in charge of a licensed pilot caused a collision as she was in course of removal from the St. Katharine Dock, in the Port of London. It was alleged that the owners of the vessel were not liable by reason of the 55th section of the Pilot Act (6 Geo. 4, c. 125), which exempted the owner or master of a vessel from liability for loss or damage occurring from the negligent act of any licensed pilot in the charge of any such ship or vessel under or in pursuance of any of the provisions of the statute. The statute by its 2nd section provided that all ships and vessels

(1) 6 M. & W. 302.

H. L. (Sc.) 1915

STEAMSHIP "BEECHGROVE" COMPANY, LIMITED v. AKTIESELSKABET "FJORD" OF KRISTIANIA.

Lord Buckmaster L.C.

within certain limits there mentioned should be conducted by pilots to be appointed by the Corporation of the Trinity House, and by no other pilots or persons whatever. At the place where the accident happened it was not necessary under the statute that a pilot should be in charge of the vessel, but none the less it was held that the owner of the vessel was not liable for the damage, because the pilot was bound to take charge of the vessel if called on, and he was in charge of the ship under the provisions of the Act. The case depended upon the construction of the 55th section of the Act of 1823, but the provisions of that section are quite different from those which regulate the liability in the present case, and I see no reason to doubt that *Lucey* v. *Ingram* (1) was correctly decided.

The next case was that of *The Stettin*. (2) That decision, however, is of little assistance, since it was held that in no part of the area where the collision occurred was pilotage compulsory, and consequently the vessel responsible for the accident was not exempted from liability for damage. The two cases which follow are, however, more nearly in point. The first is *General Steam Navigation Co.* v. *British and Colonial Steam Navigation Co.*, in the Exchequer Chamber. (3) The statute applicable in that case was the Merchant Shipping Act of 1854, s. 388 of which is to the same effect as s. 633 of the Act of 1894, although its language differs in certain immaterial respects. In that case it was held as a fact that the vessel was navigating at a spot where pilotage was compulsory, and that the master and owner of the vessel were consequently exempt; but the learned judges further dealt with the case upon the hypothesis that this assumption of fact was not well founded, and on this view they expressed their opinion on two points. The first was that as the pilot had been taken on board in an area where pilotage was undoubtedly compulsory, and was still in charge of the vessel when the accident occurred, the original relationship between the pilot and the master still continued, and no fresh contract of service had supervened.

The second point dealt directly with the meaning of the word "district," and upon this they said that the 388th section of the Act of 1854 "does not require that the pilot should be compulsorily

(1) 6 M. & W. 302. (2) Br. & Lush. 199.
(3) L. R. 4 Ex. 238.

employed where the accident happened, but only that he should have been compulsorily employed within the district where it happened." Although this latter statement was not necessary for the decision of the case, it was treated as an authority, and was followed in the later case of *The Charlton*. (1) This was a decision of the Court of Appeal, who were bound by a decision of the Court of Exchequer Chamber, but they were not necessarily bound by the expressions of opinion of the judges, which were not essential to the case. Notwithstanding this fact, the Court of Appeal, and notably Kay L.J., treated them as binding, and he expressed his own personal concurrence with the underlying principles on which these statements were based. In this case also the pilot had been taken on at a place where pilotage was compulsory and the accident had happened outside the compulsory area.

It might be possible to distinguish these cases by reference to this circumstance. It is indeed a distinction between the facts of those cases and the facts of the present; but it is a distinction too fine for me to follow. If the liability is to be measured by considering the meaning of the word "district" in s. 388 of the Act of 1854 or in s. 633 of the Act of 1894, that meaning must be the same whether the pilot is taken on board within the compulsory area or without.

The learned judges appear to have been much influenced in their view by the inconvenience of holding that a pilot's duties ended immediately the actual boundary was crossed. It seems to me that this is true; there may be great inconvenience, there may even be danger, in compelling a pilot actually to assume his duties at a moment when the ship is traversing an intangible and notional line. So far as the Act of Parliament is concerned, however, there can be no exemption, by virtue of its provisions, unless the accident is actually within the district (which I interpret as meaning the defined and fixed area) within which pilotage is compulsory.

It is, however, urged that the pilotage was in fact compulsory although outside the statutory limits, owing to the operation of the by-laws to which I have referred.

Acceptance of this view might result in extending the area of the river Clyde, for the purposes mentioned in s. 136 of the Act of 1858, to the area bounded on its western limits by the line drawn from the

(1) 8 Asp. M. L. C. 29.

H. L. (Sc.) 1915

STEAMSHIP "BEECHGROVE" COMPANY, LIMITED v. AKTIESELSKABET "FJØRD" OF KRISTIANIA.

Lord Buckmaster L.C.

island of Little Cumbrae—a further distance of some twenty miles. I cannot think that the by-laws have made or could make pilotage "compulsory by law" throughout the whole of this area, since, if that were so, there was no need for the careful definition of the area where pilotage is made compulsory by s. 136, and no need for the distinction which the by-laws draw between the area of river within which omission to use a pilot is visited by penalties and the area outside the river which is not subject to any such penalties.

There remains an argument that is independent of the Act of 1894, and it is this—that even if the point where the accident occurred was not within the district where pilotage was compulsory by the statute or the by-laws, yet, nevertheless, the captain of the ship had no choice but to accept the pilot at Greenock, on terms which compelled him to resign the navigation of the vessel into his hands, that accordingly the rôle of master and servant was never established between the owner of the vessel and the pilot, and that consequently he could not be rendered liable for the pilot's act.

It is, I think, open to doubt if this point is raised by the second of the defenders' pleas, but it has been fully argued and no objection taken on that ground.

The fallacy of the argument is to be found in the assumption that the captain of the ship was compelled to resign the navigation into the hands of the pilot. There was, in my opinion, no such legal compulsion placed upon him. It is true that the by-laws provide by by-law 37 that the pilot should take charge, but there was no penalty of any kind imposed upon the master if the vessel was not surrendered into the pilot's hands before the boundaries of the river Clyde were reached, nor upon the pilot if he did not assume charge. This omission is significant when it is observed that obedience is enforced to the earlier provision of the same by-law by the imposition of a penalty, and that performance of nearly all the other duties of the pilot is ensured by similar penalties: see, for example, by-laws 30, 32, 33, 35, and 36.

This conclusion takes the present case out of the influence of any of the several authorities to which reference has been made; for, upon examination, they will be found to depend upon whether, having regard to the special provisions applicable in each case, there was in fact compulsion upon the owner to allow the pilot

to have charge. The principle which they illustrate is stated at p. 103 of the report of *The Maria* (1), in an extract from Lord Tenterden's work upon shipping, in these words: "Where the master is bound by Act of Parliament under a penalty to place his ship in the charge of a pilot, and he does so in compliance with the provisions of such Act, the ship is not to be considered as under the management of the owners or their servants."

Accepting this principle as accurate the learned judge in the case of *The Maria* (1) examined whether or no the pilotage in that case was in fact compulsory, and found that it was, because the local statute which was applicable provided that the owners of foreign ships or vessels resorting, coming into, or departing from the port of Newcastle were "obliged and required" to receive, take on board, and employ in the piloting licensed pilots, and in case of their refusal they were none the less compelled to pay the pilotage fees. The learned judge in terms considers that this made the pilotage compulsory, and he so states in these words (2): "I am most clearly of opinion that the section referred to is compulsory. If it had been enacted simply that a pilot should be taken, without providing that in case a pilot was not taken, the pilotage should be paid, the master would clearly have been liable to be indicted for a misdemeanour in refusing to take him, for every breach of an Act of Parliament within British jurisdiction is an indictable offence." And he then considers the argument that the provision as to payment of the fees might take away the compulsory effect of the clause, and this argument he rejects; he consequently held that the master of the vessel was free from blame.

In the present case there is nothing in the statute to compel the pilot to be taken on board outside the limits of the river, nor is there anything in the by-laws which in terms imposes on the master of the vessel any duty to use his services outside the area, for the only provision of a compulsory character relating to the use of pilots is that contained in by-law 19, to which reference has already been made.

The case of *The Halley* (3) was also a case where the employment of the pilot was compulsory, and the statement of the common law, which is contained at p. 201, is made in relation to this fact. There

(1) (1839) 1 W. Rob. 95, 103. (2) Ibid. 108.
(3) (1868) L. R. 2 P. C. 193, 201.

H. L. (Sc.) 1915

STEAMSHIP "BEECH-GROVE" COMPANY, LIMITED v. AKTIESEL-SKABET "FJORD" OF KRISTIANIA.

Lord Buckmaster L.C.

is a considerable difference between a boat being in charge of a pilot properly provided, according to the by-laws made in pursuance of an Act of Parliament, and the necessity for compulsory pilotage within a limited area, and the contrast of the provisions of the Acts of 1854 and 1894 with those of the earlier statute of 6 Geo. 4, c. 125, shows, to my mind, that the later statutes were intended to confine exemption from liability within the narrower and take it out of the wider class.

In my view, therefore, the by-laws did not make pilotage outside the area of the river compulsory within the meaning either of the Act of Parliament or the principle of the common law, and for these reasons I think that the appeal should succeed, that the interlocutor of the First Division should be recalled, and that of the sheriff-substitute should be restored.

LORD DUNEDIN. (1) My Lords, I have found this case, to my mind, attended with difficulty and doubt, but that on one point only.

So far as the exemption craved is rested on the statutory words, I am clear that on a just construction of s. 633 of the Merchant Shipping Act of 1894 there was not here, in view of the circumstances, a fault or incapacity of a qualified pilot acting in charge of the ship within any district where the employment of a pilot is compulsory by law.

I need not develop the subject, for I concur in all that the noble Lord on the woolsack has said upon it, and I associate myself with the view he has taken of the decided cases.

Now, if I could take the view of Lord Skerrington, that the statutory exemption forms a code and displaces the common law, there would be an end of the matter. But it is not said in the statute that the common law is to be displaced; and hitherto, at least, it has been said again and again by judges and writers of text-books that the statutory exemption is only declaratory of a result to which, under the circumstances of compulsion, the common law would arrive.

Now, this is not an action against the ship; it is a personal action against the owners, who personally committed no fault. It can, therefore, only be supported upon the ground of respondeat superior,

(1) Read by the Lord Chancellor.

or, in other words, of the relationship of master and servant between the owners and the person actually in charge of the ship who commits the fault.

Your Lordships are prepared to hold that, though de facto the shipowners can only obtain a pilot on the terms that the pilot is to be supreme, yet de jure that pilot is the servant of the owners. It is here that I hesitate, and I candidly confess that, if left to myself, I should have come to the same conclusion as the majority of the First Division. But, in face of the unanimity among your Lordships, I do not feel justified in dissenting from the proposed judgment.

LORD ATKINSON. My Lords, this is an appeal from an interlocutor pronounced on December 18, 1914, by the First Division of the Court of Session, recalling an interlocutor of the sheriff-substitute of Lanarkshire.

The facts and legislative provisions necessary to be considered for the decision of the preliminary question which the parties have raised by their second plea in law, and desire to have determined in the first instance, have been already stated by the Lord Chancellor. The river Clyde, as defined by the several enactments referred to, may for convenience' sake be styled in this case the "compulsory area."

The plea in law of the defenders raising the question which it is desired to have first decided runs thus: "The navigation of the defenders' vessel having been in charge of a pilot whose employment was compulsory within a pilotage district in the sense of the Merchant Shipping Act of 1894, the defenders are free from any liability in respect of the collision under section 633 of the said Act, and should be assoilzied, with expenses."

The question accordingly for decision of this House is whether this is a good plea in law, having regard to the provisions of the Act of 1894, the local Acts dealing with the river Clyde, and the by-laws made under these latter.

It is not pretended that pilotage is directly made compulsory on any portion of the waters of the Clyde or its estuary outside the river Clyde as defined, but it is contended on behalf of the respondents that the Clyde Pilot Board have power to frame by-laws having the force of law providing that all river pilots shall board inward-bound vessels at Greenock, and shall on going on board

H. L. (Sc.)
1915
STEAMSHIP "BEECHGROVE" COMPANY, LIMITED v. AKTIESELSKABET "FJORD" OF KRISTIANIA.
Lord Atkinson.

take command of the vessel. Apart from this point upon the by-laws to be hereafter dealt with, the respondents, as I understand, base their claim to immunity from the damage caused on two grounds. They contend (1.) that s. 633 of the Merchant Shipping Act of 1894 should, according to the authorities, be construed as if for the word "where" occurring in the last line but one of the section were substituted the words "in any part of which," so that the section would run thus: "An owner or master of a ship shall not be answerable to any person whatsoever for any loss or damage occasioned by the fault or incapacity of any qualified pilot acting in charge of that ship within any district 'in any part of which' the employment of a qualified pilot is compulsory by law." And, second, that the word district in the section so construed means any district for which the pilot in charge may happen to be licensed by the proper licensing authority, however extensive that district may be, and however distant the place of collision from the nearest point of the compulsory area.

The respondents next relied upon the principle stated most broadly, and most recently, in the case of *The Charlton* (1), decided in the year 1893, namely this, that a pilot who navigates a ship through an area in which his employment is compulsory by law ceases to be a compulsory pilot as soon as he passes outside that area, but may, nevertheless, if he be treated as if he had continued to be that which in fact he is not, secure to the owners of the vessel he pilots continued immunity from any claim for damages caused by his own negligence.

It was held in *The Maria* (2) that s. 55 of the 6 Geo. 4, c. 125, which is somewhat similar to s. 633 of the Act of 1894, embodied this principle of the common law, that the doctrine of "respondeat superior" cannot apply where the law compels an owner to put and keep in charge of his ship for the purpose of navigating her a person he cannot himself select, and of whose skill and competence he may know nothing. As long as the statutory compulsion operates the person in charge of the ship is not the owner's servant, and the owner is therefore not responsible for his acts. Thus at common law the basis of the owner's immunity is the legal compulsion upon him. These two must synchronize in their operation, and are conterminous in their reach. When and where compulsion

(1) 8 Asp. M. L. C. 29. (2) 1 W. Rob. 95.

ceases, immunity ceases, and no agreement, express or implied, which the owner or his agent, the master, may make with the pilot can, I think, at common law prolong or renew, as regards third parties, the one or the other. If the owner or his agent, the master, should request or permit the pilot to continue in command of the ship beyond the time he is bound by law to permit him so to do, then the relation between the owner and pilot becomes at common law a contractual relation of service, to which the maxim of "respondeat superior" directly applies. In the case of *Clyde Navigation Co.* v. *Barclay* (1) Lord Hatherley lays down the rule as to the burden of proof in cases such as the present, in the words following: "In order to exempt yourself, by virtue of the provisions of the statute, (i.e., the Act of 1854) from that which is a general common law liability, you who desire the exemption must bring yourself within the provisions of the statute; and the burden is, therefore, thrown upon you of proving that the mischief was occasioned by the pilot. But the other side may prove that, although the mischief was occasioned in one sense by the bad management of the pilot, yet there was a default on the part of the owners of the ship, which default conduced to the accident." And Lord Selborne said: "Your Lordships will observe that there are three things necessary to be proved: first, that a qualified pilot was acting in charge of the ship; secondly, that the charge was compulsory; and, thirdly, that it was his fault or incapacity which occasioned the damage. I apprehend that if a defender proves all these three propositions, and proves nothing more, then the burden is upon the pursuer." I fancy that in these passages both these noble Lords had in their minds actual, not fictional or notional, compulsion. As I understood, it was not disputed—it could not, I think, be successfully disputed—that the compulsion which secures immunity from the claims of third parties must be imposed in the first instance by statute, or by by-laws made intra vires having the force of a statute. No obligation springing from any agreement, express or implied, entered into between a pilot and the owners of a vessel, either directly or through their agent, their master, touching the control or navigation of that vessel, however binding on the parties to it,

(1) 1 App. Cas. 790, 795, 796.

H. L. (Sc.) 1915

STEAMSHIP "BEECH-GROVE" COMPANY, LIMITED v. AKTIESEL-SKABET "FJORD" OF KRISTIANIA.

Lord Atkinson.

can, I think, per se prejudice in the way suggested the rights of third parties. The main questions in controversy are whether under any, and if so what, circumstances the operation of the compulsion imposed in the first instance in respect of the compulsory area can be extended beyond that area so as to secure continued immunity for the owners; and, second, whether those circumstances exist in the present case. The two authorities most strongly relied upon by the respondents on this point are *The Charlton* (1), already referred to, and the case of *General Steam Navigation Co.* v. *British and Colonial Steam Navigation Co.* (2), upon which the decision in *The Charlton* (1) was based.

Lest, if I stated in a condensed form what appear to me to be the result and bearing of the judgments of the distinguished judges who decided that case, I might do them an injustice, I venture to quote at length the relevant portions of their judgments. Lord Esher M.R. expressed himself thus: "A Bristol pilot was compulsory where he (i.e., the master of the ship) took him. Then . . . . when the vessel had passed out of the port of Bristol, when she had gone through the port and was outside the port, I have no doubt myself that he was no longer a compulsory pilot. Therefore when the accident happened he no longer was a compulsory pilot. But when he was taken on board this ship and put in charge he was a compulsory pilot, and although he had passed out of the limits where he was a compulsory pilot, he was still in charge as pilot, and in charge without any alteration of the relations between himself and the master of the ship. He was still the pilot. He was in charge of the ship, for they had not gone to such a place as that he was no longer a licensed pilot. He was in the district where he was a licensed pilot, and although he had gone beyond the port where he was a compulsory pilot, it is under such circumstances that the master could not properly be called upon to determine whether the compulsion had ceased or not. Then the necessities of the case require that you should not make him a servant of the owners when they had no real opportunity of determining whether he was or was not their servant. They were compelled to take him without his being their servant, and they had no real opportunity of seeing that that relation which had been put upon them had ceased. I have no

(1) 8 Asp. M. L. C. 29, 30. (2) L. R. 4 Ex. 238.

doubt that it was upon that ground—that to decide that the master of the ship was to take charge of the ship in such circumstances would put upon him a dangerous liability and responsibility—that the decision of the Exchequer Chamber (*General Steam Navigation Co.* v. *British and Colonial Steam Navigation Co.* (1)) was come to. It does not signify whether the spot is one where the compulsion has ceased. The mode of treating him by the master as a compulsory pilot has not ceased, and therefore we are to treat the master and the owners of the ship as still having their ship in charge of a pilot whom they took by compulsion. If so, he was not a servant of the owners, and if so the owners were not liable for negligence which was solely his negligence. I cannot help thinking that that is the decision of the Court of Exchequer." Kay and A. L. Smith L.JJ. concurred in and approved of this judgment. The former added (2): "I cannot think that would be the convenient or proper construction to put upon this section of the Merchant Shipping Act, 1854, and it seems to me that it is reasonable to say that where a pilot has been taken under compulsion to take a ship to a point in the Bristol Channel within the limits of his licence, that although that point is somewhat beyond the limits of the port of Bristol, yet if the pilot goes on taking the ship beyond that limit and the collision happens he should be treated for this purpose as a compulsory pilot, and that the master and owners of the ship should not be made liable for a collision which happens by his fault." And the latter said that, in his opinion, the remarks of the Court of Exchequer in the above-mentioned case upon this point were not obiter.

In fact the district for which the pilot was licensed in that case extended down to Lundy Island, many miles below the port of Bristol. It was not disputed that over this great reach of the estuary of the Bristol Channel, from the port of Bristol to Lundy Island, any ship was free to sail without any pilot, or again, that if she never had entered into the compulsory area she would not be protected from liability by reason of the presence of a licensed pilot on board and in charge of her; but it appears to have been considered that the mere fact that the pilot she was compelled to take on board while traversing the compulsory area was permitted to

(1) L. R. 4 Ex. 238. (2) 8 Asp. M. L. C. 32.

H. L. (Sc.)
1915
STEAMSHIP "BEECHGROVE" COMPANY, LIMITED v. AKTIESELSKABET "FJORD" OF KRISTIANIA.
Lord Atkinson.

remain in charge in effect extended the area of immunity down to the open sea. I own I have considerable difficulty in following Lord Esher's reasoning. I do not quite appreciate what he means by saying that the "owners had no real opportunity of determining when the relation which had been put upon them" had ceased. Surely he cannot have supposed that the owners, who might live in Australia or South America, should be communicated with by their agent, the master, to ascertain whether the latter would depose the pilot and himself take command as his ship passed out of the compulsory area. The master is the agent of the owners, with full power on their behalf to employ, hire, or drop pilots.

Again, I am unable to understand how as regards third parties and their common law rights the mode in which the master "*treated*" the *pilot* is to determine anything. In my view, if the master had made a specific agreement with the pilot that the latter should navigate the ship to Lundy Island and have absolute control over her till she reached that point, the rights of third parties would not be affected, because it is statutory compulsion, not contractual obligations of service, which deprives them of their rights. The master might, of course, continue the pilot in charge if he desired his assistance. The appellants do not suggest that he should not be entitled to do so, but they do insist, reasonably enough, I think, that the pilot does not carry compulsion with him, and that, if he were continued in charge beyond the compulsory area, he was in precisely the same position as if he had been taken on board at Lundy Island and employed to pilot the ship up to the seaward limit of the port of Bristol.

I find nothing in the decision to the effect that the master might not have deposed the pilot and have himself taken the command of his ship as she passed out of the compulsory area. The very fact that his continued treatment of the pilot as a pilot is regarded as a determining factor would imply that he might have altered the situation by treating him otherwise.

There is no such maxim of the Mercantile Laws as "once a compulsory pilot always a compulsory pilot," and I am quite unable to see how the mere omission by the master to take the command out of the hands of the pilot amounted to treating him as a compulsory pilot, resulting in the forfeiture of the rights of innocent third parties.

The case of *General Steam Navigation Co.* v. *British and Colonial Steam Navigation Co.*, reported in the Court of Exchequer (1) and in the Exchequer Chamber (2), upon which the decision of *The Charlton* (3) is expressly based, and upon which the respondents so much relied, is somewhat different in character.

There the defendants' vessel, registered in and belonging to the Port of London, through the fault of a pilot taken on board at Dungeness, who had actual control of the ship, came into collision with and damaged the plaintiffs' vessel at a point between Yantlett Creek and Gravesend. If the Port of London extended to Yantlett Creek, the defendants' vessel was at the time of the collision in her own port; if, on the contrary, it only extended to Gravesend, she was not at that time in her own port.

It was admitted that pilotage was compulsory under the Merchant Shipping Act, 1854, within the London district, which extended from Dungeness to London Bridge. A pilot taken on board at Dungeness would, in the ordinary course of things, navigate the ship to Gravesend and there be put on shore, receiving for that service a fee fixed by the regulations. By the 59th section of the Pilot Act (6 Geo. 4, c. 125) it is enacted that the master of any vessel, not being a passenger vessel, may pilot his ship while she is in the waters of the port to which she belongs.

The contention of the defendants was that the London district was one entire and indivisible thing, though in practice and for convenience' sake licences were never given to the same pilot to pilot ships above and below Gravesend; that Gravesend was the place to which the master was bound to carry the pilot before dropping him; that even if the limit of the Port of London lay seaward of Gravesend, the whole course to Gravesend was one indivisible thing, and that the pilotage, having been compulsory when originally commenced at Dungeness, continued so to be up to the point where the pilot was to be dropped.

The question for decision, therefore, was not, as in *The Charlton* (3) case and as in the present case, the extension of the operation of compulsion beyond the limits of the compulsory area, but the suspension of compulsion within a compulsory area, and it was

(1) L. R. 3 Ex. 330. (2) L. R. 4 Ex. 238.
(3) 8 Asp. M. L. C. 29.

H. L. (Sc.)
1915
STEAMSHIP "BEECHGROVE" COMPANY, LIMITED v. AKTIESELSKABET "FJORD" OF KRISTIANIA.
Lord Atkinson.

insisted that the master, by taking on board the pilot to carry him to Gravesend and paying him for piloting the ship to that place, contracted himself and his principals the owners out of, as it were, the statutory exception. The decision turned to some extent on the meaning of the words used in the 59th section of the Pilot Act of 1825. Martin B. inclined to the opinion that these words only applied to vessels navigating from place to place within the port to which the vessel belongs, but bowed to the existing decisions. He was clear, however, that if the master of the defendants' ship, though signalling all the way from Dungeness for a pilot, had failed to get one before his ship passed into the waters of the Port of London, he would not then, though in a compulsory area, be obliged to take a pilot; but he held (1), nevertheless, that even if Yantlett Creek was the boundary of the Port of London, "when the pilot was taken in compulsorily at Dungeness, and employed to navigate the ship to Gravesend, the ship did not when she arrived at Yantlett Creek become a ship navigating within the limits of the port to which she belonged, so as to constitute the pilot a servant of the defendants, and render them liable for his default." He was further of opinion that under the provisions of the Acts of Parliament the pilot was entitled, if not bound, to pilot the ship to Gravesend, and that no liability was cast upon the defendants by the mere circumstance that the ship had arrived at Yantlett Creek. He refused to recognize the case of *The Stettin* (2) as an authority in the case, because *Lucey* v. *Ingram* (3) had not been cited in it.

Channell B. concurred in this judgment, and Bramwell B., who only heard part of the argument, concurred so far as he had heard it. Kelly C.B. dissented, holding on the facts that Yantlett Creek was the limit of the Port of London; that it was distinctly so decided in *The Stettin* (2) case; that it was not compulsory on the master of a ship belonging to the Port of London to employ a pilot at a point within that port; that the case of *Lucey* v. *Ingram* (3) was decided upon the special provisions of the 55th and 72nd sections of the Pilot Act (6 Geo. 4, c. 125), and not on the Act of 1854, the wording of which was altogether different (in which statement he was perfectly accurate). The case came on appeal before the

(1) L. R. 3 Ex. 341. (2) Br. & Lush. 199.
(3) 6 M. & W. 302.

Exchequer Chamber. The Court was a very strong one. It was composed of Byles, Keating, Mellor, Montague Smith, and Hannen JJ. The unanimous judgment of the Court was on May 14, 1869, delivered by Byles J. They held that the Port of London did not extend beyond Gravesend. Consequently, as the collision occurred at a spot further down the river than Gravesend it did not occur in the Port of London, and there was an end of the case. Byles J. is reported to have expressed himself thus (1): "Two questions arise. First. Whether the accident happened at a spot within the limits of the Port of London, for if it did not, then the defendants' captain was bound at that spot to have on board a pilot, and the defendants are not responsible for the pilot's want of skill or care. Secondly. Whether, assuming the spot where the accident happened to be within the Port of London, the defendants nevertheless are protected from liability, although their vessel belonged to that port, the pilot having been compulsorily taken on board at Dungeness to pilot the vessel from thence to Gravesend." He distinctly states, however, that, even if the Port of London extended to Yantlett Creek, the Court thought the defendants would not be liable. And he gives as his reasons: First, that by the Act of 1854 pilots engaged at Dungeness may be taken first to the Nore or Sheerness, and next to Gravesend, but cannot be engaged for any intermediate distances. Second, that it was compulsory upon masters to take a pilot for that distance; that the pilot could insist on being paid for all the way to Gravesend, and to be carried there; that there had been, in effect, a contract between the captain and the pilot that the pilot should go to Gravesend, should be paid to Gravesend, and should act as pilot to Gravesend; that during the first part of the transit, the relation of master and servant did not exist between the owners of the defendant's vessel and the pilot, and that the Court could not see any indication of a fresh contract as to the latter portion of the transit. And the learned judge proceeded to say that "the 388th section of the 17 & 18 Vict. c. 104 does not require that the pilot should be compulsorily employed where the accident happened, but only that he should have been compulsorily employed within the district where it happened. This

(1) L. R. 4 Ex. 244, 246.

H. L. (Sc.) 1915

STEAMSHIP "BEECH-GROVE" COMPANY, LIMITED v. AKTIESEL-SKABET "FJORD" OF KRISTIANIA.

Lord Atkinson.

is not only the literal interpretation of the statute, but it obviates all the mischief which might be apprehended from captains of ships unnecessarily and improperly employing pilots to escape the responsibilities of navigation, while it preserves the sole responsibility of the pilot in the whole of the district for which he was employed."

It must be remembered that the Court was, as I have said, dealing with a case of exemption from compulsion in a compulsory area, and the judgment should be read secundum subjectam materiam. I find nothing, however, in the earlier part of it inconsistent with the right of a master to take from a pilot, originally employed in a compulsory area, the command of his ship as soon as she passes beyond that area. It is possible he might be liable to the pilot under such a contract as was made in that case for breach of contract, but nothing more. Nor do I find anything inconsistent with the conclusion that in such a case, from the time the ship passed out of the compulsory area, the pilot was no longer a compulsory pilot, but stood to the master and the owners of the ship merely in the relation in which a pilot hired in a non-compulsory area stands to them.

With reference to the construction of the 388th section of the Act of 1854, I am unable, with the most profound respect for the learned and distinguished judges who decided this case, to find anything in reason or justice to sustain their construction of this section. A pilotage district may be very vast. In *The Charlton* (1) case it extended many miles down the Bristol Channel beyond the compulsory area, the port of Bristol. In the present case it extends at least four miles, perhaps more, beyond the compulsory area. I am quite unable to discover upon what principle the fact that the pilot was originally employed in the compulsory area is to secure to him the privilege of negligently running down or injuring, in every part of the district for which he is licensed, the vessels of third parties without any risk of loss to the owners he serves. In my view, this construction disregards the common law rights of third parties and ignores the principle upon which the immunity of the owner of the ship in fault is based. I accordingly think the construction is erroneous and I respectfully decline to adopt it. Within one month and two days after the delivery of this judgment the Judicial

(1) 8 Asp. M. L. C. 29.

Committee of the Privy Council, composed of the then Master of the Rolls, Lord Romilly, Sir William Erle, Sir James Colvile, and Sir Joseph Napier, decided the case of *The Lion* (1), in which was cited not only the decision of the Court of Exchequer but possibly that of the Exchequer Chamber in the last-mentioned case. The collision in that case took place on the river Thames and was due to the negligence of a licensed pilot in charge of the steamship *Lion* at the time. The owners of this ship were sued for damages. The preliminary question raised was whether the *Lion* was at the time of the collision a passenger ship or not. If she was a passenger ship, then under the 397th section of the Act of 1854 the employment of a pilot was compulsory; if not, it was admittedly optional. It was held that the *Lion* was not, at the time of the collision, a passenger ship, and therefore that the employment of the pilot was optional. The cases of *The Stettin* (2) and *Lucey* v. *Ingram* (3) were cited. The decision in the former was approved of and followed, and it was pointed out, as it already had been done by Kelly C.B., that *Lucey* v. *Ingram* (3) was no authority whatever upon the point in dispute, since it was decided upon the special words of the 72nd section of 6 Geo. 4, c. 125, which are wholly different from those of the 389th section of the Act of 1854. The latter section is identical with the 633rd section of the Merchant Shipping Act of 1894.

Lord Romilly, after criticizing at length these several cases and others, says: "According to the principle of these decisions the owners are not exonerated from responsibility for the default of the pilot whom they have selected and placed in charge of their ship, when by law there was no obligation imposed on them to take such pilot and put him in charge . . . . and, secondly, that having taken a pilot, even assuming that the pilot was bound to act, this does not in such circumstances exonerate the owners from responsibility for the errors committed by the pilot in a case where they were not compellable to take a pilot, and put him in charge."

This last paragraph meets much of the argument that was addressed to your Lordships on behalf of the respondents, based on the following words occurring in the 27th by-law: "And the pilot when on board shall have sole charge of the vessel." These

(1) L. R. 2 P. C. 525, 534. (2) Br. & Lush. 199.
(3) 6 M. & W. 302.

H. L. (Sc.)
1915
STEAMSHIP "BEECHGROVE" COMPANY, LIMITED v. AKTIESELSKABET "FJORD" OF KRISTIANIA.
Lord Atkinson.

words are of no avail, however, when the act of taking the pilot on board is a voluntary act. No provision such as this made by the body licensing the pilot, and no stipulation made by the pilot himself when he is being hired, as to his having complete control over the ship, will secure immunity for the owners if the taking of the pilot was not compulsory by law, because compulsion by law is the true basis of immunity, and cessat ratio cessat lex.

As the master was not compelled by law to keep on the pilot after the ship passed from the port of Bristol, I think the decision of Lord Esher on this point is in conflict with the law as laid down by Lord Romilly.

The case of *The Stettin* (1) was decided on the 6 Geo. 4, c. 125. The vessel belonged to the Port of London and was inward bound from Bordeaux to London. She took on board a Trinity House pilot, by whose negligence she came into collision near Regent's Canal in the river Thames with another ship or barge. By the 59th section of the 6 Geo. 4, c. 125, she was relieved from the obligation to take compulsorily a pilot while she was navigating the port to which she belonged. Dr. Lushington held that as she was not bound to have the pilot on board her owners were not protected, and the Judicial Committee, consisting of Lords Kingsdown and Chelmsford, Sir Edward Ryan, and Sir L. Peel, upheld that decision and thought it was right. Sir Robert Phillimore refers to the case of *The Stettin* (1) in the case of *The Hankow* (2), the decision in which, however, turned upon the 59th section of the Pilotage Act, 1825 (6 Geo. 4, c. 125). He does not, I think, disapprove of the decision in *The Stettin* (1) case. He also deals with the decision in *General Steam Navigation Co.* v. *British and Colonial Steam Navigation Co.* (3) in these words. He said: "I am unable to extract any assistance from that case, and I find myself rather perplexed in reading the judgment." I confess I share in that perplexity.

Your Lordships' House is not bound by the decision of the Court of Exchequer Chamber or that of the Court of Appeal. In view of this conflict of authority one must rely upon the principle upon which immunity is based. In my view the immunity of the owners of ships for injuries caused by those ships through the negligence of

(1) Br. & Lush. 199. (2) (1879) 4 P. D. 197, 203.
(3) L. R. 4 Ex. 238.

the pilot in charge of them rests upon this, that they are compelled by law to have that pilot in charge at the time and place the collision occurs, that because of that compulsion the pilot is not the servant of the owners, and that they are therefore not responsible for his acts. I further think, with all respect for the great judges who decided these cases, that these decisions are unsound in principle and are in conflict with decisions almost, if not altogether, as authoritative as themselves, and I decline to follow them.

Then as to the by-laws, it is not contended that they are ultra vires. I concur with Lord Skerrington in thinking that they do not purport to extend the area of compulsory pilotage as fixed by s. 136 of the Act authorizing the making of them. If they did they would be ultra vires. By by-law 31 river pilots are required to reside at Greenock and Glasgow, where they may be picked up and discharged respectively. These arrangements may be very convenient. That, however, is beside the point, and, of course, a master may with great prudence leave the control of his ship to a pilot, both in the river and Firth of Clyde. Nobody contends that he should be deprived of that advantage.

I further concur with Lord Skerrington in thinking that there is nothing in these by-laws to prevent the master of an incoming ship, who picks up a pilot at Greenock, from keeping control of his ship till he reaches the compulsory area, nor to prevent the master of an outerbound vessel, who has taken a pilot on board at Glasgow, from putting the pilot aside and taking the command of his own ship as soon as she passes out of the compulsory area.

I see none of the dangers to which Lord Esher alludes in *The Charlton* (1) case in enabling him so to do.

Mr. Laing urged that these statutes and by-laws should be reasonably construed and enforced, and that it would be very difficult for masters to know precisely when they passed into or out of the compulsory area, or to be prepared for a change of control.

The first difficulty could be got over by buoying or in some other way easily ascertainable marking the boundary of the river. The second is, I think, fanciful.

On the whole I am of opinion that the decision appealed from was wrong and should be reversed, that the decision of the sheriff-

(1) 8 Asp. M. L. C. 29.

H. L. (Sc.) 1915

STEAMSHIP "BEECHGROVE" COMPANY, LIMITED v. AKTIESELSKABET "FJORD" OF KRISTIANIA.

substitute was right and should be restored, and this appeal should be allowed, with costs here and below.

LORD SHAW OF DUNFERMLINE. (1) My Lords, the appellants are owners of the British steamship *Blaenavon*, and the respondents of the Norwegian steamship *Fjord*. At a point on the estuary of the river Clyde, nearly opposite Princes Pier, Greenock, these two vessels collided. The present proceedings ensued. The appellants sue for 5500*l*. The respondents counterclaim for 600*l*. Each ship blames the other. The present appeal, however, has arisen in connection with the defence set up by the owners of the *Fjord*, the respondents. Their defence was repelled by the learned Sheriff-Substitute Fyfe, but has been upheld by the majority of the First Division of the Court of Session. I am humbly of opinion that the dissent from that judgment by the learned Lord Skerrington was on all points correct, both in reasoning and result, and that the jugdment appealed from should be reversed.

The defenders' plea is as follows: "The navigation of defenders' vessel having been in charge of a pilot whose employment was compulsory within the pilotage district in the sense of the Merchant Shipping Act, 1894, the defenders are free from liability in respect of said collision under section 633 of the said Act." This is not a common law defence; it is a defence founded upon the statute, and it is that defence which has been upheld.

There has been so much reference to decided cases, both in the Courts below and in the argument on this appeal, that it appears to me advisable again to quote s. 633, which is the groundwork of this plea. It is, as your Lordships are aware, truly a temporary provision. In a few years' time such an exemption from liability will have disappeared from the Merchant Shipping Code.

The section is as follows: "An owner or master of a ship shall not be answerable to any person whatever for any loss or damage occasioned by the fault or incapacity of any qualified pilot acting in charge of that ship within any district where the employment of a qualified pilot is compulsory by law."

Geographically the position of the matter is this: A straight line drawn from the eastern end of Newark Castle, on the south shore of

(1) Read by Lord Atkinson.

the Clyde, to the mouth of Cardross Burn, on the north shore, divides, by s. 75 of the Clyde Navigation Act of 1858, the river Clyde from the estuary, the "river" being to the eastward of that line up to Glasgow, and the "firth" being to the west of that line down to Little Cumbrae. By the Act a pilot board was created. It had certain powers over the whole of this area, and in particular, under ss. 127 and 134, powers to license pilots for both river and firth. The section dealing with compulsory pilotage applies solely to "any part of the river as defined by this Act." Within that area it is not lawful for any person to navigate without a pilot any vessel exceeding sixty tons burden; to that area—the river—compulsory pilotage extends. Outside of that, as far as the Cumbraes, the pilotage is not compulsory. Geographically the language of the Act of Parliament is as plain and incontrovertible as this.

There is power given to the trustees to make by-laws quoad the river (119) for "regulating the conduct of the owners, masters, pilots, and crews of vessels," and quoad the firth or estuary (139), to the pilot board for "the good government, police, and proper navigation of all vessels." With regard to the point for decision in this case, there the statutory provisions end. I am humbly of opinion that these sections are not in conflict, but that, upon the contrary, the power of making by-laws was for the purpose of carrying out, and in no respect whatsoever of limiting, restricting, or controverting the other provisions of this statute. The geographical limits of the river defined by, sect. 139 stand, and must stand, exactly as the Act has defined them. To the east of the Newark-Cardross line compulsory pilotage is prescribed, and the area so defined could not, without violation of this statute, be extended in any direction by by-law, or apart from statutory amendment, alteration, or repeal.

When s. 633 of the 1894 Act accordingly speaks of a "qualified pilot acting in charge of that ship within any district where the employment of a qualified pilot is compulsory by law," it can, in my humble judgment, not extend, so far as the Clyde is concerned, to any district west of the Newark-Cardross line. To the east of that line and up to Glasgow "the employment of a qualified pilot is compulsory by law"; to the west of that line it is not. My Lords, with every respect to the English judges who have come to the

H. L. (Sc.) 1915

STEAMSHIP "BEECHGROVE" COMPANY, LIMITED v. AKTIESELSKABET "FJORD" OF KRISTIANIA.

Lord Shaw of Dunfermline.

decisions analysed by your Lordships, I think that this case depends upon statute, and that it ends at this point.

The actual place of collision was at the tail of the bank opposite the Princes Pier at Greenock, four miles west of the Newark-Cardross line, and well within the voluntary pilotage area. The scheme of the by-laws appears to have been to have two sets of licensed pilots—one for the river and the other for the firth. According to the practice which, however, prevails, one man obtains a licence for both districts; and in working out this plan it has been found for the convenience of all parties expedient that pilots should reside in Greenock and be available for call at that port. By-laws appropriate to these topics are made, and one of these by-laws says that when the pilot boards the vessel he should be in charge of the vessel. He might be taken on at Greenock, or he might have been taken on as far west as the Cumbraes, but the argument presented to your Lordships' House is that, he being on the ship and in charge of it, the by-law operates ipso jure as an extension of the "district where the employment of a qualified pilot is compulsory by law."

My Lords, it is fortunately highly inexpedient to elaborate this point, for, in the view which I take, it would be totally incompetent for a pilot board so to act as to extend the district where the employment of a qualified pilot is compulsory by law. And if any by-law has purported to do that it would not be carrying out, but controverting, the express provisions and geographical limitations of the 1858 statute.

There is no Scotch case which gives sanction for doing this, and with regard to the English cases I do not, speaking with respect and for myself, find that (dealing as they do with different statutes and different circumstances) they illustrate this particular Act of 1858 in such a way as to permit me to construe it apart from these geographical limitations to which I have referred. The statutory provision is not affected or controlled by, and it makes no stipulation on, the subject of the point where the employment of the qualified pilot took place, or the tract of water (a great part of which may lie outside the district in which pilotage is compulsory) for which a pilot's services are engaged. But what the statute has to do with is, I repeat, "the district where the employment of a qualified pilot is compulsory by law."

I put this case during the argument, and I cannot say that I received any satisfactory answer to it: Assume a vessel outward bound from Glasgow, and therefore under the charge of a pilot, to reach the Newark–Cardross line, and to pass, that is to say, from the river, in which the employment of a qualified pilot is compulsory by law, into the firth, where it is not. Assume this vessel to meet an inward-bound steamer, and the inward-bound steamer having sailed to that limit which it can do without any contravention of either statute or by-law without a pilot. Then, being about to enter the river, she requires a pilot, and the pilot from the outward-bound vessel is thereupon transferred to it. He takes charge on or near the actual line which is the western boundary of the river by law.

Is there anything contrary to law in that? Is there anything in any by-law which would compel the vessel in such circumstances to go back to Greenock and go through the form of taking up the pilot there? I humbly do not think there is. The illustration is not fantastic. It would apply to-day in the same way to any vessel sailing from Port Glasgow to Glasgow, a pilot being picked up at the former port. At a point actually three or four miles to the west of that and down the firth this collision occurred. It humbly appears to me to have no bearing upon the case to say that the vessel had to pick up the pilot opposite that point, namely, at Greenock. If the meaning of that is that it was an excellent or convenient arrangement and in accord with the by-law, good and well. That cannot affect the statutory limitations. But if the meaning of it is that it so far affected them as to produce a result equivalent to extending the river four miles to the west of its specified boundary, I cannot hold this to be in accordance with law. The respondents' case necessarily involves that the same reasoning would apply if the pilot was picked up at the Cumbraes. He would be a duly licensed pilot; his district would include a large tract of water within which pilotage was voluntary and a smaller tract of the river within which it was compulsory. The illustration is merely given to show how strange would be the results of leaving the plain geographical limits set forth by the statute.

My Lords, with regard to the English decisions, I agree with the analysis and reasoning upon those given in the judgments read by

H. L. (Sc.) 1915

STEAMSHIP "BEECHGROVE" COMPANY, LIMITED v. AKTIESELSKABET "FJORD" OF KRISTIANIA.

Lord Shaw of Dunfermline.

my noble and learned friends who have preceded and are to follow me. I only presume to add to these judgments these two points: First, without differing in any way from Lord Wrenbury's view as to the case of *Lucey* v. *Ingram* (1), I must say that the statute there under construction was couched in language very different from the 75th section of the Clyde Act of 1858. In the second place, I think, if I may respectfully say so, that confusion has been introduced into this department of the law by the expression "compulsory pilot." What the statute deals with is a place, area, or district where pilotage is compulsory. But if the word "compulsory" is to be applied to the man, the pilot, then once a licensed pilot is on board of a vessel he carries this adjective or quality with him (such is apparently the inference) in such a way as to put the ship itself under compulsory pilotage and to convert the area into a compulsory area, although with regard to the latter the point of collision was out of bounds, and with regard to the former compulsory pilotage was not prescribed! All this, in my opinion, is concluded adversely by the consideration that the place of employment or the place to which the employment can be extended either before the compulsory pilotage area is reached or after it is left is truly an irrelevant consideration in view of the clear and very plain language of the Merchant Shipping Acts.

I agree that the appeal should be allowed.

LORD PARMOOR. (2) My Lords, I concur in the opinion which Lord Wrenbury is about to read. Under the statute the employment of a qualified pilot is not compulsory outside the river area. The by-law that "the pilot when on board shall have sole charge of the vessel" does not make the employment of a pilot compulsory by law outside the river area. It does no more than constitute a contractual condition to which the master of the ship assents on obtaining the services of a qualified pilot. If the by-law purported to extend the area of compulsory pilotage outside the statutory limits, it would, in my opinion, be invalid and not within the by-law powers of the pilotage board.

If the above construction of the statute and by-law is correct, there is no separate question of common law. Having regard to the

(1) 6 M. & W. 302.

(2) Read by Lord Wrenbury.

full examination which has been made of the authorities, it is not necessary further to refer to them.

The appeal should be allowed with costs.

LORD WRENBURY. My Lords, the question here is whether at the time of the collision the *Fjord* was in charge of a pilot whose employment was compulsory, with the result that her owners are free from liability. The question has been argued under two heads, namely, (1.) whether the owners are within s. 633 of the Merchant Shipping Act, 1894, and (2.) whether at common law the relation of master and servant ever arose between the owner and the pilot so as to render the former liable for the negligence of the latter.

Having regard to ss. 136 and 75 of the Clyde Navigation (Consolidation) Act, 1858, the *Fjord* at the moment of the collision was not at a place where she was bound to navigate with a pilot. She was entitled at that place to navigate by her own officers. She had taken a pilot on board at Greenock, which was, under the regulations, a proper place to take him, but she was in waters in which, so far as the Clyde Act of 1858 was concerned, she was entitled to keep charge of the navigation by her own officers, and not to give charge to the pilot.

The pilotage board constituted by s. 128, however, had made (as by s. 139 they were entitled to make) by-laws for the proper navigation of vessels at places which included the place where the collision occurred, and had by by-law 37 provided that "the pilot when on board shall have sole charge of the vessel." They had also by by-law 17 provided that pilots should be licensed in two classes, namely, river pilots licensed to pilot between Glasgow and Greenock (which was the present case) and deep sea pilots licensed to pilot between Greenock and Little Cumbrae.

The question to be determined upon the Acts and by-laws is whether, for the purposes of s. 633 of the Merchant Shipping Act, 1894, the pilot was on these facts acting in charge of the ship within a district where the employment of a qualified pilot is required by law. Two questions arise—the one on the word "district," the other on the words "required by law."

My Lords, as regards the latter, in my judgment the employment of a qualified pilot was not, under the circumstances of this case,

H. L. (Sc.) 1915

STEAMSHIP "BEECHGROVE" COMPANY, LIMITED v. AKTIESELSKABET "FJORD" OF KRISTIANIA.

Lord Wrenbury.

"required by law." My reasons for this opinion are as follows: First, the law required a pilot in the circumstances mentioned in s. 138 of the Clyde Act. The power to make by-laws did not extend to allow of an extension of s. 138. It empowered only by-laws for the proper navigation of vessels having regard to s. 138. *The Ruby* (1) is not an authority that the area of compulsory pilotage can be enlarged by by-law under such a power to make by-laws as is contained in the Act of 1858. The decision in *The Ruby* (1) is based upon the fact that the local Act 53 Geo. 3, c. clxxxiii., by its preamble and by s. 17, contemplated acts and gave power to the Commissioners to do acts for establishing and regulating the pilotage of ships, and that the subsequent Act of 1845 gave, by s. 158, power to make by-laws for regulating the pilotage, and that, having regard to the Act of 1813, this meant establishing pilotage. Under these provisions it was held that a by-law could make pilotage compulsory. That is not this case. The definition of the area of compulsory pilotage is the definition of an area within which third parties will, in case of collision, be deprived of a right which otherwise they would have against the owners. The Clyde Act of 1858 had defined what that area was. The by-laws could not extend it.

Secondly, the provision in the by-laws by which it is said that they extended the area is found in by-law 37: "The pilot when on board shall have sole charge of the vessel." In my opinion this provision was contractual only and not compulsory.

Inasmuch as the ship was, under the circumstances mentioned in s. 138, bound to have a pilot, the pilotage board was, I think, bound reasonably to supply one. They could not attach any conditions they liked to supplying one; they could, I think, attach reasonable conditions. I doubt whether it would be a reasonable condition which they could lawfully impose that the master should give over the charge of his vessel to another when he was not in law bound to do so. But, assuming the condition to be reasonable, its acceptance by the ship created a contractual and not a compulsory obligation. If the pilotage authority says I will give you a pilot if you will give him charge from the time he comes on board, and the ship consents, the result is that a contractual and not a compulsory obligation is imposed upon the ship. "Compulsory"

(1) 6 Asp. M. L. C. 577.

for the present purpose does not mean the compulsion of necessity which leads the ship to acquiesce, but the compulsion of law which prevails whether the ship assents or not.

As to the latter point, it is contended that s. 633 is operative not only at the point where the employment of a pilot is compulsory, but in "any district where the employment of a qualified pilot is compulsory by law," and it is argued that "district" means "pilotage district," and that the words mean "within any *pilotage* district *in any part of which* the employment" is compulsory. The pilotage district here, it is said, is Greenock to Glasgow, for the pilot's licence was to pilot between those places, and in some part (although not this part) of that district pilotage was compulsory.

My Lords, to my mind the contention does violence to the language. The rights of third parties are not to be taken away by words which as they stand and without altering "where" into "in any part of which" do not affect them. In the present case, if the contention is right, the whole voyage from Little Cumbrae to Glasgow could have been made the subject of compulsory pilotage, if the pilotage board had elected (as they might) to license a pilot for the whole of that distance, with the result of making it one pilotage district.

My Lords, upon the question of s. 633 of the Merchant Shipping Act, 1894, I think the appellants are right.

As regards the common law I am far from clear that there is any separate question. But I will assume that apart from s. 633 there may be an arguable point. The point, if it exist, is this: When the pilot was taken on board at Greenock, and, in fact, took charge of the vessel, did he take charge by the request or with the assent of the master so as to constitute the pilot the servant of the owner, or did he take charge adversely to the master and because he had the right so to do? This vessel was going from free waters into compulsory waters. As a subsidiary question, would the result be different if she had been coming from compulsory waters into free waters?

My Lords, in my judgment there is no difference between the two cases. In each case it seems to me that at the moment when the vessel is in free waters the pilot can only take or keep charge, and by implication he did take or keep charge, by the request of the

H. L. (Sc.)
1915
STEAMSHIP "BEECH-GROVE" COMPANY, LIMITED v. AKTIESEL-SKABET "FJORD" OF KRISTIANIA.
Lord Wrenbury.

master. Take the present case; the pilot came on board on the terms (see by-law 37) that he should have sole charge. I have stated my reasons for thinking that that was a contractual term. The pilot takes charge by the contractual consent of the ship. The owners have adopted him as their servant. Take the case of the pilot who had been shipped, say at Glasgow, had come down the river, had crossed the arbitrary line, and was no longer in the river but in the firth. When she crossed the line the master, but for the contractual term, could have said "I shall now take charge," and the pilot could not have said him nay. He did not do so. Why? Because by contract, after the line was crossed, he was to leave the pilot in charge. He was there from that moment by contract, and the relation of master and servant existed.

My Lords, so far I have abstained from all reference to authorities. I go on to consider what the authorities are.

In *Lucey* v. *Ingram* (1) it was held that the owner need not have employed a pilot at all. But he did so. The ship was held to be within s. 72 of the Pilot Act (6 Geo. 4, c. 125) a ship "wanting a pilot" because she wished for a pilot. Under these circumstances the Court held that the pilot was "acting in the charge of such ship under" the provisions of the Act within s. 55, because under s. 72 he was bound to take charge. My Lords, I am unable to agree. The obligation of the pilot to serve arose under the provisions of the Act. But his acting in the charge of the ship arose, not under any of the provisions of the Act, but by reason of the ship's asking him to act, from which it resulted that under the provisions of the Act he was bound to comply. *Lucey* v. *Ingram* (1), I think, was wrongly decided.

The Stettin (2), in the Privy Council, was a case in which the vessel inward bound to the Port of London came into collision within her own port, but was at the time being navigated by a duly licensed pilot. She had passed from an area of compulsory pilotage—had entered an area in which she was not compelled to have a pilot—but remained, in fact, in charge of the pilot. The ship was held liable for damage. This decision concurs with my own opinion. It is applicable to the present case unless a distinction is to be drawn—and I have said that, in my opinion, it is not—between the case

(1) 6 M. & W. 302. (2) Br. & Lush. 199.

of a ship passing from compulsory into free waters and that of a ship passing from free into compulsory waters.

In *General Steam Navigation Co.* v. *British and Colonial Steam Navigation Co.* (1) the Court of first instance followed *Lucey* v. *Ingram* (2) and not *The Stettin.* (3) In the Exchequer Chamber it was held that the ship was not at the time of the collision within her own port and that pilotage was therefore compulsory. The point, therefore, did not arise, and what was said upon it was but dictum. I am bound, however, to say that I do not agree with the dictum. The grounds relied upon are two: First, that up to Gravesend pilotage was compulsory and that "we cannot see any indication of a fresh contract as to the latter portion of the transit." Fresh contract there could be none, for the previous relation was not contractual but compulsory. A contract (not a fresh contract), as I have already said, was, I think, to be inferred so soon as the compulsory relation terminated. Second, that the words of the Act are "within the district." I have already expressed my opinion upon the effect of these words. Lastly, the Court distinguished *The Stettin* (3) on the ground with which I have already dealt, namely, that in *The Stettin* (3) the vessel was passing from compulsory waters into free waters. My Lords, *General Steam Navigation Co.* v. *British and Colonial Steam Navigation Co.* (4) is, upon the point before the House, dictum only and not decision; and with the dictum I cannot agree.

In *The Charlton* (5), however, the case was by inadvertence treated by the Court of Appeal as a decision binding upon that Court. The *Charlton* was proceeding from compulsory to free waters. Lord Esher M.R. decides the case on the ground that the pilot was no longer a compulsory pilot, but that he was still "in charge without any alteration of the relations between himself and the master of the ship." My Lords, I cannot follow this. The original relation was that the pilot was dominus; it mattered nothing whether the master wished him to have charge or not, he was compelled to let him have charge. The subsequent relation was that the pilot was not dominus at all. The master could have

(1) L. R. 3 Ex. 330; L. R. 4 Ex. 238.
(2) 6 M. & W. 302.
(3) Br. & Lush. 199.
(4) L. R. 4 Ex. 238.
(5) 8 Asp. M. L. C. 29, 31.

H. L. (Sc.) 1915

STEAMSHIP "BEECHGROVE" COMPANY, LIMITED v. AKTIESELSKABET "FJORD" OF KRISTIANIA.

Lord Wrenbury.

told him to go below and could, adversely to the pilot, have taken charge himself. Secondly, the Master of the Rolls decides on the word "district." This is the point upon the statute with which I have already dealt. Lastly, he decides it on the ground of expediency, of the difficulty which would arise in determining when the terminus of compulsory pilotage had been reached. My Lords, the rights of third parties cannot, I think, be taken away on grounds of expediency. Kay L.J. adds no further ground. A. L. Smith L.J. decides upon *General Steam Navigation Co.* v. *British and Colonial Steam Navigation Co.* (1) in the Exchequer Chamber.

In *The Lion* (2) it was held that the vessel was not carrying passengers and was therefore not bound to take a pilot. The Board followed *The Stettin* (3) and not *Lucey* v. *Ingram.* (4)

My Lords, these are the authorities. Upon authority the balance is, I think, in favour of the view which I expressed in the earlier part of this opinion. However this may be, I submit to your Lordships that when this collision occurred the ship was in charge of the pilot, not compulsorily against the master but contractually by the implied request and consent of the master, and that as towards third parties the owners cannot protect themselves from liability upon the ground of compulsory pilotage.

It results that, in my judgment, this appeal succeeds.

Interlocutor of the First Division of the Court of Session in Scotland reversed and interlocutor of the sheriff-substitute of Lanarkshire restored. The respondents to pay the costs of the action in the Court of Session and also the costs of the appeal to this House.

Lords' Journals, October 18, 1915.

Agents for appellants: *William A. Crump & Son, for Fyfe, Maclean & Co., Writers, Glasgow, and Campbell Faill, S.S.C., Edinburgh.*

Agents for respondents: *Thomas Cooper & Co., for Maclay, Murray & Spens, Writers, Glasgow, and J. & J. Ross, W.S., Edinburgh.*

(1) L. R. 4 Ex. 238.
(2) L. R. 2 P. C. 525.
(3) Br. & Lush. 199.
(4) 6 M. & W. 302.

[HOUSE OF LORDS.]

HERBERT (BY HIS NEXT FRIEND) (PAUPER) . APPELLANT; AND SAMUEL FOX & CO., LIMITED . . . . . RESPONDENTS.

H. L. (E.)*
1916
Jan. 24.

Employer and Workman—Compensation—Injury by Accident—Arising out of Employment—Prohibited Act—Sphere of Employment—Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *s.* 1, *sub-s.* 1.

A workman employed as a shunter upon his employers' private railway was seriously and permanently injured by falling from the buffer of a wagon upon which he was improperly riding. His duty when wagons were being moved was to walk in front of them and keep a look-out, and a notice to that effect was posted on the employer's engine-shed. On the occasion of the accident, at the conclusion of some shunting operations, four wagons were being pushed by an engine towards the engine-shed when the workman, instead of walking in front of the train, climbed upon the buffer of the leading wagon and sat there till he fell and was run over. Upon a claim for compensation under the Workmen's Compensation Act, 1906, the county court judge found that the accident arose in the course of and out of the employment:—

Held by Lord Atkinson, Lord Shaw of Dunfermline, and Lord Wrenbury, Earl Loreburn and Lord Parmoor dissenting, that the man, in sitting on the buffer, was acting outside the sphere of his employment, and that therefore the accident did not arise out of his employment.

Barnes v. *Nunnery Colliery Co.* [1912] A. C. 44 and *Plumb* v. *Cobden Flour Mills Co.* [1914] A. C. 62 applied.

Per Lord Atkinson: An arbitrator ought to distinguish clearly between his rulings on law and on fact, and cannot by finding in the words of the statute secure for a finding on a pure question of law, or on a question of mixed law and fact, that unassailability which belongs only to a finding on a question of pure fact.

Decision of the Court of Appeal [1915] 2 K. B. 81 affirmed.

APPEAL from an order of the Court of Appeal reversing an award of the county judge for Yorkshire under the Workmen's Compensation Act, 1906. (1)

The appellant applied for compensation in respect of an accident

* *Present:* EARL LOREBURN, LORD ATKINSON, LORD SHAW OF DUNFERMLINE, LORD PARMOOR, and LORD WRENBURY.

(1) [1915] 2 K. B. 81.

H. L. (E.) 1916 HERBERT v. SAMUEL FOX & Co., LIMITED.

which occurred on January 17, 1914. The appellant was a lad of nineteen years of age, and was employed as a shunter on a private railway belonging to the respondents and connecting their works with the Great Central Railway. His duties were to link up any wagons which required to be moved and then to walk in front of the wagons to keep a proper look-out so as to be able to warn the engine-driver, if necessary, to stop the train.

On the day of the accident, after the conclusion of certain operations, the shunting engine was being driven tender first, pushing trucks back to the engine-shed. The appellant, instead of keeping a look-out by walking in front of the first truck, climbed upon the buffer of the truck, holding his shunting pole with both hands. The end of the pole was under the drawbar of the truck. The pole slipped, and the appellant fell and was run over by the truck. As the result of the accident both his legs had to be amputated.

Notices were posted up in the engine-shed to the following effect: "When railway waggons are being moved by hand or by engine a look-out man must be in front of the waggons. Any person not obeying this order will be instantly dismissed. By order of the Works Manager."

The appellant stated in his evidence that he knew it was rather a dangerous thing to ride upon the buffer; it was against the rules; it was no part of his work to get on to the wagons, and if the manager saw a man riding on the buffer he would be dismissed.

The county court judge found that the accident arose out of and in the course of the employment. To ride on the buffer was a breach of the rules and possibly serious and wilful misconduct, which, as the lad was permanently incapacitated, afforded no answer to the claim. He therefore awarded compensation.

The Court of Appeal by a majority (Lord Cozens-Hardy M.R. and Swinfen Eady L.J., Phillimore L.J. dissenting) set aside the award.

1915. Nov. 30. *H. T. Waddy* and *Paley Scott*, for the appellant. This is a question of fact for the county court judge, and the burden of proving that he has misdirected himself is on the respondents. The appellant was acting against the rules, but he was not acting outside the sphere of his employment. He was doing the work

which he was employed to do, namely, keeping a look-out, but was doing it in the wrong way. This case is covered by *Chilton* v. *Blair & Co.* (1) and is distinguishable from *Barnes* v. *Nunnery Colliery Co.* (2), because in that case the boys had no duties in relation to the tubs in which they rode.

Rigby Swift, K.C., and *T. E. Ellison*, for the respondents. Two questions of fact arise: 1. What was the man's employment? 2. How did the accident occur? When those facts have been found it is a question of law on the statute whether the injury arose out of the employment. But, be that as it may, there is no evidence upon which the finding of the county court judge that this injury arose out of the employment can be sustained. The man's employment was to walk in front of the trucks and keep a look-out, and the nature of the employment did not take him at all on to the trucks. There is no evidence of any employment which would justify him in riding on the buffer. The true principle is stated by Lord Dunedin in *Plumb* v. *Cobden Flour Mills Co.* (3) Tried by any of the tests there laid down the claim for compensation fails. A rule may have one of two effects. It may mark out the sphere of employment, or it may regulate conduct within that sphere. This rule falls under the former head. The appellant, upon his own admission, was disobeying the rule, and was doing something which he was not employed to perform and which would render him liable to instant dismissal. He was acting outside the sphere of his employment and was going into a territory with which he had nothing to do and into which he was forbidden to go. His employment was on the level. This was not a risk reasonably incidental to the employment, but was an added risk. There is a distinction between aggravating a risk and introducing into the employment an entirely new risk. *Chilton* v. *Blair & Co.* (1) and *Mawdsley* v. *West Leigh Colliery Co.* (4) fall on the one side of the line and *Brice* v. *Edward Lloyd, Ld.* (5) and *Barnes* v. *Nunnery Colliery Co.* (2) on the other.

Waddy replied.

(1) [1914] W. N. 290; [1915] W. N. 203; 7 B. W. C. C. 607; (1915) 8 B. W. C. C. 324.
(2) [1912] A. C. 44.
(3) [1914] A. C. 62.
(4) (1911) 5 B. W. C. C. 80.
(5) [1909] 2 K. B. 804.

H. L. (E.) 1916

HERBERT v. SAMUEL FOX & CO., LIMITED.

The House took time for consideration.

1916. Jan. 24. EARL LOREBURN. My Lords, in this case a youth was employed as a shunter. He ought to have walked in front of an engine and some wagons which were being shunted. Instead of doing this he got on to one of the buffers, contrary to orders, and either in getting there or while sitting there, it cannot matter which, fell and suffered frightful injuries. The county court judge held that the injury by accident was one arising out of the employment. The Court of Appeal by a majority decided otherwise; they thought that there was no evidence that could support the county court judge's decision.

I fear it is inevitable that different minds should reach different conclusions in cases of this kind. Precedents are of little value on such points, for the facts are almost always distinguishable and reasoning by analogy is dangerous, and the efforts made by Courts of law, including this House, to throw light on this difficult Act have often proved disappointing, because there has arisen a tendency to treat judicial dicta delivered secundum subjectam materiam as though they qualified the statutory language.

I can only look at what happened and ask myself, might not the county court judge reasonably say that this injury arose out of the employment? I think he might. He might conclude that this unfortunate youth was doing his work in a wrong and forbidden way, but still doing his work as shunter. It appears to me a case of serious and wilful misconduct which might fairly be regarded as within the terms of the Act. That was a conclusion of fact for the judge alone, just as it is a conclusion of fact for a jury in an action for negligence when they are asked whether on the facts proved or, it may be, admitted there was or was not negligence. I cannot agree to the view that whenever facts are undisputed the proper conclusion from them is necessarily a matter of law. That would dangerously enlarge our jurisdiction.

LORD ATKINSON. My Lords, this is an appeal against the order of His Majesty's Court of Appeal pronounced on January 21, 1915, which ordered that an award made in favour of the appellant by his Honour Judge Benson, sitting in the county court of Sheffield on

August 13, 1914, be wholly set aside, and that an award be entered in favour of the respondents.

I confess that but for the difference of opinion in the Court of Appeal and in this House I should have thought that this was an absolutely plain case. Every one must have great sympathy with the unfortunate appellant, but human sympathy can never work less worthily than in warping the judgments of judicial tribunals. I therefore put it entirely aside, and permit myself to be influenced solely by the desire to do absolute justice to each of the parties litigant.

Phillimore L.J. apparently justifies his dissent from the conclusions at which his two colleagues arrived by the discovery he made that the members of the House who decided the ruling case of *Barnes* v. *Nunnery Colliery Co.* (1) based, as I understand him, their judgments upon the view that the boy who was in that case injured got into the colliery tub to amuse himself, and not to save himself from fatigue or for any other reason. At p. 92 of the report of the present case (2) he is represented as having expressed himself thus: "In *Barnes* v. *Nunnery Colliery Co.* (1), if the view had been accepted which the learned county court judge took, the case would have been a very strong one indeed, but, if the head-note is right, it is clear, I think, that the House of Lords found that there was no evidence to justify his finding. If that is so, what view did the House of Lords take? Did they take the view that the boys were merely saving fatigue by riding in the tubs, or did they take the view that the boys were doing it for amusement? It seems to me it is open to the latter construction, and, knowing, as I do, the views of the learned Lords, I cannot help thinking that they did take the view that the boys were amusing themselves, and that this view underlies their decision."

The finding of the county court judge, which the House decided there was no evidence to support, was, as appears from this very head-note, this, "that the accident arose out of the injured boy's employment." I had the honour of being one of the members of the House who took part in the decision of that case. I did not trouble myself to form any opinion whatever upon the question whether the boys had ridden in tubs for amusement, or from laziness, or from a desire to avoid fatigue, for two reasons: first, because in

(1) [1912] A. C. 44. (2) [1915] 2 K. B. 81, 92.

H. L. (E.) 1916 HERBERT v. SAMUEL FOX & Co., LIMITED. Lord Atkinson.

order to decide any of these questions I should have had to usurp an authority which did not belong to me, since they were questions of pure fact, of which the county court judge was the sole and absolute judge; and, second, because, the question for decision being, in effect, whether the act done by the boy by which he met his death fell within or without the sphere of his employment, I considered that no topic could be more irrelevant than the nature or state of his emotions, feelings, intentions, or desires when riding in this tub. The county court judge had found "that the deceased did not ride in the tub for his own pleasure but for the objects of his employers." The House never decided that there was no evidence to support this particular finding.

There is not a word in the judgment of Lord Loreburn referring to it in the most remote degree. In the judgment which I had the honour to deliver I accepted the finding of the county court judge, that the deceased did not ride in the tub for his own pleasure but for the objects of his employer, and at pp. 49 and 50 endeavoured to point out that this might be so and yet his act be outside the sphere of his employment. Lord Mersey said (1): "The learned judge also finds that the boy was not riding for his own pleasure but for the object of his employers. For my part I think he was riding for his own pleasure, but this again is immaterial, and for the same reason."

By what process of reasoning the conclusion can be reached that a judge bases his decision on a matter which he himself declares is immaterial passes my comprehension. With all respect to the learned Lord Justice, his assumption on this point is entirely erroneous, and is unsupported by anything to be found in the only place in which support for it can legitimately be sought, namely, the authorized report of the case. I think it well to correct this error as the case is frequently cited as an authority.

I concur with the majority of the Court of Appeal in thinking that the present case is governed by the decisions of this House in *Barnes* v. *Nunnery Colliery Co.* (2) and *Plumb* v. *Cobden Flour Mills Co.* (3), properly understood. The principle laid down in them was, in my view, this, that where a workman meets with an accident while doing something actually outside the sphere of his employment, that

(1) [1912] A. C. 51. (2) [1912] A. C. 44.
(3) [1914] A. C. 62.

accident does not arise, and cannot be held to arise, out of his employment, and that this is so whether he did that act from a desire for amusement, from feelings of fatigue, or to forward the object of his employer. Of course, an accident occurring to a man while he is, in fact, resting may well arise out of his employment, as, for instance, if a sailor should be thrown from his bunk while he is asleep or is resting, by the rolling and pitching of his vessel in a heavy sea ; but once the limits of the workman's sphere of employment have been ascertained and determined they cannot be expanded or contracted according to the state of his own feeling, desires, or intentions.

The workman in this case was very candid. He gave his evidence truthfully, with courage and frankness. He says he was engaged shunting wagons at 12.30 on the day of the accident. The wagons had to be pushed into a certain shed by an engine which was running tender first. He picked up and coupled fifteen or twenty loose wagons standing on the rails between the Siemans (1) and this shed. These were being pushed towards the shed. Some of them, including that farthest from the engine and nearest to the shed,—the foremost as he styled it—were high-sided. He did not get into it. He mounted its right-hand buffer, sat upon the buffer, balancing himself with shunting pole, his legs hanging out on the right-hand side of the line. The pole slipped. He fell and was injured.

A good deal of the argument was addressed to the House such as might have been addressed to it if it had been the appellant's duty to be upon this buffer, and that his only error consisted in not taking due and proper care while there not to fall off. He would then be doing negligently and carelessly something within the scope of his employment. But his own evidence shows conclusively that it was not his duty to be on the buffer ; that, on the contrary, it was his duty not to be upon it. He was employed to do a particular work away from it, and was expressly forbidden, while engaged in that work, to be anywhere but on the ground, walking in front of the foremost wagon. He says he got on the front wagon to keep a look-out. He admits that his proper duty *was to walk* in front of the wagon to keep a look-out. That it was no part of his duty to get on the wagon. That it is a dangerous thing to ride on the buffer. That it is against the rules to do so. That if the manager saw him

(1) The Siemans was a department at the other end of the works.

H. L. (E.) 1916

HERBERT v. SAMUEL FOX & Co., LIMITED.

Lord Atkinson.

riding on the buffer he would be dismissed. That notices were put up in the locomotive shed to this effect. The notice referred to runs as follows: "When railway waggons are being moved by hand or engine a look-out man must be in front of the waggons. Any person not obeying this order will be dismissed."

As the appellant was the look-out man on this occasion, his proper place was, according to this rule, in front of the wagons, not upon the buffer of one of them. That rule he admits was not winked at. It was rigidly enforced. Rules such as this are, I think, made more to save the lives and limbs of workmen than the pockets of employers. And, speaking entirely for myself, I may say that I think an ill service is done to the working classes in permitting such rules as these to be disregarded, in that it slackens discipline, and encourages to carelessness and rashness, from which they themselves are the greatest sufferers.

In the present case it is quite plain to me that the learned county court judge entirely misunderstood the force and effect of this rule. He regarded it solely as a rule the violation of which might possibly amount to wilful misconduct within the meaning of s. 1, sub-s. 2 (*c*), of the statute of 1906, depriving a man, whose case came within s. 1, sub-s. 1, of the compensation to which he would otherwise be entitled. But the rule has another and an entirely different function, namely, this, to fix the limits of the workman's sphere of employment. If an employer employs a workman to do a particular kind of work in an indicated place, and prohibits him from doing a different kind of work in quite another place, the doing of the prohibited work in the prohibited place is not merely wilful misconduct depriving him of the right to compensation, for the simple reason that he never had any right to compensation at all, since the prohibition placed the latter work outside the sphere of his employment. If there ever was a case in which the act, in the doing of which the accident occurred, was outside the sphere of the workman's employment, it was, I think, this case. He was in a place in which he had been forbidden to be and had no right to be. He was thereby knowingly exposing himself to risks not reasonably incidental to his employment, risks which neither he nor his employers contemplated that he should run, risks which the employer forbade him to run, new perils added by his own rashness.

This case has no resemblance whatever, in my view, to *Mawdsley* v. *West Leigh Colliery Co.* (1) There a workman did the very thing he was employed to do, and it was his duty to do, but did it in a rash and prohibited manner. It is equally distinguishable from *Chilton* v. *Blair & Co.* (2) There a boy was employed to turn a certain machine. The posture he ought to have assumed was a standing posture. He sat down on a ledge attached to the machine, where boys, if they thought they could escape the eye of the master, were in the habit of sitting; but he kept on turning the machine—his posture alone was changed. A boy who was passing spoke to him, he turned round to reply, his foot slipped, and he was injured. Here again the act in the doing of which the accident occurred was within the workman's sphere of employment. It was the rather rash manner of doing it that was alone prohibited.

The county court judge has adopted the somewhat bald but now rather fashionable form of finding that "accident arose in course of and out of employment." I presume he means the appellant's employment. And your Lordships were pressed with the usual argument, that as the county court judge, though a judge of law and fact, is the sole judge of fact, his findings cannot be disturbed if there be any evidence before him upon which he, as a reasonable man, could find as he has found. That argument is quite sound if it be applied to pure findings of fact. It is utterly unsound if it be applied either to findings on pure questions of law or on mixed questions of law and fact.

The rule is analogous to that followed in setting aside the verdicts of juries. There is, however, this vital difference between the two cases. Juries can only decide questions of fact. The arbitrators in these cases can decide questions both of law and of fact. There is no danger in trials by juries that they will return composite findings of law and fact. It is wholly illegitimate, in my view, in cases such as the present, by finding in the words of the statute to endeavour to secure for a finding on a pure question of law, or on a mixed question of law and fact, that unassailability which properly belongs only to a finding on a question of pure fact. Numberless instances could be given where the statutory finding involves a finding on a

(1) 5 B. W. C. C. 80.
(2) [1914] W. N. 290; [1915] W. N. 203; 7 B. W. C. C. 607; 8 B. W. C. C. 324.

H. L. (E.) 1916 HERBERT v. SAMUEL FOX & CO., LIMITED. Lord Atkinson.

question of law. For instance, if the workman be employed under an agreement in writing, and that writing, either by itself or supplemented by rules published in the works and enforced, marks out the nature and limits of the workman's employment.

If the county court judge desires to try the case properly he must first ascertain the sphere of the workman's employment; but that involves the construction of written documents. That is a question of pure law. The county court judge, having ascertained the sphere of the workman's employment, must next determine how the accident occurred. That is invariably, I should think, a question of fact. He has then to apply the written document to the facts so found and decide whether the accident causing the injury arose out of some act or event within the sphere of the workman's employment. That, in my view, is also a question of law, since it involves determining the meaning of a written document. However that may be, there is no doubt as to the first question. If the Court which reviews the decision of the county court judge disagrees with his findings on matters of law it can overrule them without being hampered by the rule touching his findings on matters of fact.

It is quite true that to entitle the appellant to recover his case must come within the words of the statute, and that no test can oust those words; but that is no reason whatever for the arbitrator mixing up the decision which he must make on questions of law, in order to decide whether or not the workman's case comes within the statute, with decisions on questions of fact which he must also make for the same purpose. When he rules a question of law that fact should appear on the face of his award. If his ruling be erroneous the award can be set aside from error on its face, and one can at once determine whether the arbitrator has, as it is styled, misdirected himself. If the award takes this form, "I find that the accident arose out of and in the course of the employment of the applicant and award him so many shillings per week," I fail to see how error in law can appear on the face of such an award as that. In the formal award in this case at p. 13 of the appendix no finding of any kind is set forth. The arbitrator's note of the evidence is not any part of his award. In the present case there is no conflict of evidence.

The county court judge's finding that the accident arose in

the course of and out of the employment is, in my opinion, a determination that the facts proved by the appellant, which are, as against him, to be taken to be true, bring the case within s. 1, sub-s. 1, of the statute. To determine that he must construe the statute—that is, determine its meaning. This is, I think, a question of law, not of fact. In *Moore* v. *Naval Colliery Co.* (1) the workman, a collier afflicted with disease of the eyes, had not made his claim within the time required. The question was whether the delay was due to a "reasonable cause" within s. 2, sub-s. 1 (*b*), and s. 8, sub-s. 4, of the Act of 1906.

Farwell L.J. expressed himself thus: "The only question for us is a question of law, whether the failure to make the claim within the period mentioned was occasioned by reasonable cause. The facts which go to show whether that cause is, or is not, reasonable are for the judge of first instance, and are not reviewable by us. Whether those facts constitute reasonable cause, or not, is a question of law for us."

This was because it involved the construction of the section of the statute, the ascertainment of its meaning. That is, I think, the true principle, and is applicable to the present case.

In my opinion the ruling of the county court judge was erroneous. The order appealed from was right and should be affirmed, and this appeal be dismissed with costs.

LORD SHAW OF DUNFERMLINE. My Lords, the question to be determined is a familiar one. It is whether there was any evidence in this case from which it could be affirmed that the accident arose out of the shunter's employment. He has been injured so very seriously that his case must evoke unfeigned compassion. He was a witness of manifest truthfulness and candour.

Upon this question the entire evidence is given by the appellant. It is as follows: "I knew that to get on a wagon when moving was a very dangerous and forbidden thing. It was rather a dangerous thing to ride on the buffer. It is against the rules. It is not part of my work to get on to the wagons, but many shunters do so in order to keep a look-out. My proper duty is to walk in front of the wagon to keep a look-out. If a manager saw a man riding

(1) (1911) 5 B. W. C. C. 87, 95.

H. L. (E.) 1916

HERBERT v. SAMUEL FOX & Co., LIMITED.

Lord Shaw of Dunfermline.

on the buffer of a wagon he would be dismissed. There are notices put in the loco. shed to this effect."

I cannot bring my mind to affirm that these premises formed any warrant for the conclusion that the accident arose out of the employment. The act which brought it about did not arise out of the employment; the act was dangerous and forbidden in the employment, subjecting any workman who did it to dismissal; it was not part of the course of the employment, but a going outside of it. So long, accordingly, as the words of the Legislature remain, namely, that in order to infer liability upon the employer it must be found that the act arose not only in the course of but out of the employment, I cannot bring the facts, nor do I think it reasonably possible to bring them, up to a justification of liability.

In my view this case is not one of making a mistake, or even doing a wrong, in a mere breach of rules affecting the service. It is outside the scope of the service altogether; and it was that, and that alone, and not the employment, which brought about the special danger from which the man performing the act suffered. I may add, my Lords, that if it were held that this was an accident arising out of the employment, and that compensation was due, then, in my humble opinion, a real and damaging blow would have been delivered at the whole system of safeguards and protections under which, in many industrial employments, so much may be effected for the safety of life and of limb of the workers engaged.

The statute is sufficient for the case; authority cannot warp the Act, as has been over and over again said in these recent years. But if authority were invoked, I think the cases of *Plumb* (1) and of *Barnes* (2) would be the most helpful upon analogy.

With much regret, I think that this appeal should be dismissed.

LORD PARMOOR. My Lords, in this case the county court judge has decided that there is a liability to pay compensation to the appellant. This decision is final subject to an error of law.

The notice of appeal to the Court of Appeal formulates the grounds of appeal on which the respondents rely. These grounds are that the applicant failed to show any circumstances which would justify a finding that the accident to him arose out of his employment,

(1) [1914] A. C. 62. (2) [1912] A. C. 44.

and that the learned judge misdirected himself in not holding that the applicant in boarding, or attempting to board, a wagon in motion, or in riding, or attempting to ride, on the buffer of the wagon, was acting outside the sphere of his employment, and that by such conduct he brought upon himself a new and added peril, and one not incidental to his employment. If either of these grounds can be maintained the appeal fails.

It will be convenient to deal in the first instance with the allegation of misdirection. Neither the breach of a rule, nor serious or wilful misconduct, in the case of death or permanent disablement, disentitle an applicant to claim compensation, although they bring upon him a new and added peril, and the injury results from such new and added peril, so long as the accident which caused the injury arises out of and in the course of the employment. I think that there was no misdirection, and that it was the duty of the learned judge to consider on the evidence before him whether the applicant proved that the injury did arise out of his employment.

I come, then, to the second ground in the notice of appeal, that the applicant failed to show any circumstances which would justify a finding that the accident to him arose out of and in the course of his employment. The evidence shows that the accident did take place during the shunting of certain wagons by engine power. The applicant, under the orders of the engine-driver, and in the ordinary work of a shunter, coupled certain wagons to the engine, which was running tender first and pushing the wagons. There was a rule that when railway wagons were being moved by hand or engine a look-out man must be in front of the wagons. This rule was an important one, and any person not obeying the rule was subject to instant dismissal. It was obviously in the main intended to protect persons who might be on or about the line while shunting work was going on, but, as found by the learned county court judge, it was binding on the applicant. The applicant did not comply with the rule, but after coupling the wagons either got on a buffer with his shunting pole in his hand, or boarded, or attempted to board, a wagon in motion. It is not material to determine here exactly what the applicant did or attempted to do. Assuming that his actions amounted to serious and wilful misconduct, this would not under the circumstances of this case afford any answer to the claim.

H. L. (E.)
1916
HERBERT
v.
SAMUEL FOX
& Co.,
LIMITED.
Lord Parmoor.

On this evidence I think it was clearly competent for the learned judge to find that the accident did arise out of and in the course of the employment of the applicant. It is not necessary to say that the learned judge might not have come to the conclusion that the applicant had exposed himself to a risk unconnected with his employment and therefore outside the range of his service. The answer is that he did not come to this conclusion, and that there is evidence in support of his finding. The accident happened to a shunter during a shunting operation, within the area to which his service extended, subject to a rule applicable to a shunting operation, and which he ought to have observed, because he was performing a shunting operation. I cannot say, as a matter of law, that an injury so caused did not arise out of the employment of the appellant. On the contrary, it appears to me that the rule was imposed for the purpose of minimizing a risk, reasonably to be regarded as incidental to the employment of a person engaged in a dangerous service.

My Lords, I agree in the opinions expressed during the hearing of this case, that there is little use in referring to previous cases, and that there is a tendency to overload the words of the statute by refinements based on case law. There were two cases to which special reference was made—*Barnes* v. *Nunnery Colliery Co.* (1) and *Blair & Co.* v. *Chilton.* (2) In the first case it was held that a boy, riding to his work on a tub, was not injured from an accident arising out of his employment; in the second case it was held that a boy who was forbidden to sit while at work was not outside the range of his service, though doing his work in the wrong way. These decisions simply illustrate the principle that whether a particular case is on one side of the line or the other can only be determined in reference to the special circumstances.

My Lords, in my opinion each case depends on the special circumstances, and, so long as there is evidence, the decision is for the statutory tribunal. It makes no difference that the conclusion of the statutory tribunal is drawn from facts not in dispute. This factor neither diminishes the area of the jurisdiction of the statutory tribunal nor enlarges the area of the jurisdiction of the Court of Appeal. I concur in the opinion of the noble Earl on the woolsack and think that the appeal should be allowed with costs here and below.

(1) [1912] A. C. 44. (2) [1915] W. N. 203; 8 B. W. C. C. 324.

LORD WRENBURY. My Lords, I agree in the view taken by Lord Atkinson and Lord Shaw and am unable to concur in the opinion of the other two of your Lordships who have preceded me.

No recent Act has provoked a larger amount of litigation than the Workmen's Compensation Act. The few and seemingly simple words "arising out of and in the course of the employment" have been the fruitful (or fruitless) source of a mass of decisions turning upon nice distinctions and supported by refinements so subtle as to leave the mind of the reader in a maze of confusion. From their number counsel can, in most cases, cite what seems to be an authority for resolving in his favour, on whichever side he may be, the question in dispute. My Lords, to my mind this is labour thrown away. I prefer to go back to the words of the statute, and, guided by certain broad principles which must be taken to be established, to seek to apply those words to the particular case before me.

The case before the House is one in which the workman was seriously and permanently disabled. It is therefore no defence to his claim that he was guilty of serious and wilful misconduct. I have to see upon the facts found by the county court judge whether within the meaning of the statute the accident arose out of and in the course of the employment. The first questions are, what are the facts which the county court judge has found, and was the sentence I will read in a moment a finding simply of fact? The judge does not state the law as he understands it and is about to apply it, but says simply "I find accident arose in course of and out of employment." In that sentence he is not finding simply a fact; he is finding that from certain facts there results a certain conclusion of law. If there is no evidence to support the finding of fact, or if the facts found do not support the conclusion of law, the decision is appealable.

The facts here found are (*a*) that this man was employed in shunting, (*b*) that he was bound to keep a look-out in the front of the trucks, and (*c*) that to do so on the buffer or on the side of the truck was a breach of rule. Upon these facts the conclusion of the learned judge was, in my opinion, wrong in law.

I have to determine whether, in placing himself in peril on the buffer, he was acting within the scope or sphere of his employment, or whether (assuming that a buffer can be called a territory, and

H. L. (E.) 1916

HERBERT v. SAMUEL FOX & Co., LIMITED.

Lord Wrenbury

using Lord Dunedin's words in *Plumb* v. *Cobden Flour Mills Co.* (1)) he, when he seated himself upon the buffer, " went into a territory with which he had nothing to do."

The same proposition, regarded from a somewhat different point of view, may be illustrated by using Lord Atkinson's words in *Barnes* v. *Nunnery Colliery Co.* (2) Speaking of the servant, Lord Atkinson said : " He exposed himself to a risk he was not employed to expose himself to—a risk unconnected with that employment, and which neither of the parties to his contract of service could ever be reasonably supposed to have contemplated as properly belonging or incidental to it." For the present case this has to be read " a risk to which he was, by order, expressly forbidden to expose himself, and a breach of which order would involve instant dismissal."

In my opinion the thing done, irrespective of misconduct, was outside the scope of his employment. It is comparable to the act of a miner employed to work in level A, which is safe, who goes to work in level B, which is dangerous, and there sustains personal injury. It was an act " different in kind from anything he was required or expected to do, and also is put outside the range of his service by a genuine prohibition " (the words are Lord Loreburn's words in *Barnes* v. *Nunnery Colliery Co.* (3)). The risk was " an added peril due to the conduct of the servant himself " : per Lord Dunedin. (4) He was not doing a permitted act carelessly, but doing an act which he was prohibited from doing at all : see per Lord Mersey. (5) It results, in my judgment, that the accident here did not arise out of and in the course of the employment.

For these reasons I think that the decision of the majority of the Court of Appeal was right, and that this appeal should be dismissed.

Order of the Court of Appeal affirmed and appeal dismissed.

Lords' Journals, January 24, 1916.

Solicitors for appellant : *Pitman & Sons, for Chambers & Son, Sheffield.*

Solicitors for respondents : *James B. Somerville, for F. G. & H. E. Smith, Bradford.*

(1) [1914] A. C. 62, 66.
(2) [1912] A. C. 44, 50.
(3) [1912] A. C. 44, 47.
(4) [1914] A. C. 62, 68.
(5) [1912] A. C. 44, 51.

[HOUSE OF LORDS.]

Ex parte WEBER.

H. L. (E.)*
1916
Feb. 17.

Habeas Corpus—Alien Enemy—Internment—Nationality—German-born Subject—Loss of German Nationality by Residence Abroad.

A German-born subject left his country in 1898 and had remained abroad ever since. After residing uninterruptedly for fifteen years in England, where he carried on business, he, being then aged thirty-two, was interned in a war camp as an alien enemy, whereupon he moved for a writ of habeas corpus.

By the North German Nationality Law of June 1, 1870, as extended by a statute of 1873 to the whole German Empire, Germans who remained abroad for an uninterrupted period of ten years thereby lost their nationality. By a German military statute of 1874 Germans who had lost their nationality and had not acquired any other were bound, on returning to Germany in order to take up their permanent residence there, to present themselves for military service, provided that they were notbound to serve in time of peace after the completion of their thirty-first year:—

Held, that the applicant had not so completely lost his German nationality that he could be treated for the purposes of the application as having ceased to be a German citizen, and that the application failed.

Whether the Courts of this country will recognize a person as having no nationality, *quaere*.

Order of the Court of Appeal [1916] 1 K. B. 280, n., affirmed.

APPEAL from an order of the Court of Appeal (Swinfen Eady, Phillimore, and Bankes L.JJ.) [1916] 1 K. B. 280, n., affirming an order of the Divisional Court (Lord Reading C.J. and Darling and Lush JJ.) whereby an application by the appellant for the issue of a writ of habeas corpus, or in the alternative for an order nisi for such writ, was refused.

The appellant was thirty-two years of age. He was born on January 30, 1883, at Neuwied in the Rheinprovinz in Germany. He left Germany in August, 1898, for South America, and after residing there for about two and a half years came to England in January, 1901. He had resided in England continuously since that time. Since 1901 he had been continuously employed as a clerk in the London office of a French poultry merchant. In 1903 he married

* *Present:* LORD BUCKMASTER L.C., EARL LOREBURN, and LORD ATKINSON.

H. L. (E.) 1916

WEBER, *Ex parte.*

a lady of Dutch extraction, by whom he had two children, neither of whom knew any German. In August, 1914, he was registered, contrary to his express desire, as a person of German nationality. He immediately took steps to procure the removal of his name from the register, but those proceedings were not persisted in. On July 7, 1915, he was interned as an alien enemy in the war camp at Stratford in Essex without any charge being brought or conviction had against him. On July 20, 1915, he applied for a writ of habeas corpus. He claimed that by virtue of a German statute of 1870 (1) he had lost his German nationality by ten years' uninterrupted residence abroad and that he was a person of no nationality.

The application was supported by an affidavit of Mr. G. C. F. Schirrmeister-Marshal, a barrister-at-law of the Inner Temple, who was qualified to practise as an advocate in the German Courts and was a Doctor of Laws of the Universities of Berlin and Leipzig. He stated his opinion that by the terms of the statute of June 1, 1870, the appellant ceased to be a German subject in or about the year 1908; that the statute of July 22, 1913, which came into force on January 1, 1914, was not retrospective and could not affect the position of the appellant; but that if he had not already lost his German nationality, as in the opinion of the deponent he undoubtedly had, then under the provisions of s. 26 of the Act of 1913 he must have done so on attaining the age of thirty-one, namely, on January 29, 1914.

The Divisional Court and the Court of Appeal were of opinion that the appellant had not entirely lost his German nationality for all purposes, and they therefore refused his application.

The appellant's case, as stated in his reasons, was that he had long ago been released from his allegiance to the German State, and, having ceased to be a German subject, was not an alien enemy; that he was a person in humble amity with His Majesty the King, residing and peaceably trading in his dominions and subject to his protection; that the Aliens Restriction Act, 1914, the Defence of the Realm Act, 1914, and the Orders in Council made thereunder did not together or separately confer any power of arrest or imprisonment except for breach or alleged breach of their

(1) The material provisions of the German statutes are set out in a note on p. 426.

provisions, or on reasonable grounds of suspicion of an intended breach; and that he had not been charged with such breach or intended breach, nor were there any grounds on which he could be reasonably suspected thereof.

Schiller, K.C., and *Thomas Baty*, for the appellant. The appellant is a gentleman of no nationality. The Crown has no power to intern any one who is not an alien enemy and who is living under its protection. Nationality depends on allegiance. Allegiance once broken, nationality ceases. That is a question of the municipal law of the country of one's birth. It is the German municipal law which has to determine whether the appellant retains his German nationality, and the Act of 1870 says in terms that he has lost it. He has no rights or liabilities of a German national until he takes some step to have his nationality restored to him: Clunet's Journal du Droit International Privé, vol. 20, pp. 906–7, vol. 22, p. 640; Oppenheim's International Law, 1st ed., vol. 1, p. 356, s. 302. The provisions in the German statutes for enabling a person in the position of the appellant to reacquire his German nationality imply that he has lost it.

[LORD BUCKMASTER L.C. Is there anything in the German statutes which dissolves the obligation of the appellant to serve in the German army?]

The Act of 1874 as to military service deals only with former Germans who return to Germany to take up their permanent residence there. The doctrine expressed by the maxim Nemo potest exuere patriam, which once generally prevailed, is now as generally discarded and a right of expatriation admitted: Westlake's International Law (1910 ed.), part 1, p. 237.

LORD BUCKMASTER L.C. My Lords, the facts in this case have been very fairly and fully stated by Mr. Schiller, and they are accurately set out in the judgments both of the Divisional Court and of the Court of Appeal. It is unnecessary, therefore, to refer in detail to what those facts may be.

Without doubt the applicant, Antonius Weber, was originally of German nationality; it is equally indisputable that he has never acquired any other nationality. He left his own country when he

H. L. (E.) 1916

WEBER, *Ex parte.*

Lord Buckmaster L.C.

was fifteen years old in 1898, went for a time to South America, and then came to this country, where he has since resided. It is well established that nationality is not lost merely by residence in another State, whether that residence be transient, or whether it be permanent, and I desire to say nothing upon the question as to whether or no this country will recognize a man as having no nationality; it may be a matter of great importance, and I do not think it necessarily arises for decision. I only desire to guard myself against appearing to assent to such a proposition.

The real question here is whether the applicant has completely lost his German nationality, and the reason why he is said to have lost it is this: that by a statute which was passed in 1870, and made applicable to the whole of the German Empire in 1873, provisions are enacted which show that by absence from Germany for a period of ten years certain definite rights which a German citizen possesses are lost. The words of the statute are undoubtedly very wide. They are stated by s. 21 to be that a German who resides during ten years uninterruptedly in a foreign country loses his citizenship. My Lords, it is, I think, important to bear in mind what is involved in nationality in order to ascertain what was intended by the statute to be involved in loss of citizenship. It is a commonplace to state that nationality confers rights as well as imposes obligations. It is not clear to my mind that the obligations which were imposed on this applicant by his birth in Germany have been dissolved by what has taken place. The burden of proving that these obligations have been taken away undoubtedly rests upon the applicant, and in my opinion that duty has not been discharged. One of the most critical and important of all of these obligations is that cast upon a citizen of any country when called on to defend the rights of that country by force of arms. The learned barrister who has made an affidavit in support of the application in this case nowhere states that the obligation upon this applicant so to serve the German Empire has been taken away. And it is the more material to observe that fact when it is remembered that this matter proceeded to the Court of Appeal after the learned Lord Chief Justice in the Divisional Court had pointed out that there was nothing to show that this obligation had been removed. No

attempt, however, was made to amend the evidence, and it still remains with that strange and important gap.

My Lords, I think there is good reason why the affidavit did not proceed further than it did. In the first place, it appears that, by an Act of 1874, a man in the exact position of the present applicant, if he returned to Germany for purposes other than a transient visit, would become liable to be called upon to join the military forces of the empire; and, although a limit is imposed in that statute in times of peace within which that right of the State is to be exercised, no such limit exists in times of war. It therefore follows that if the present applicant returned to Germany and did no more than to show that he intended to reside there he would at once become liable to German military law and to be called upon to take his place with the forces in the field.

My Lords, that is not the only connection which still subsists between the applicant and the country of his birth. By s. 21 of the Act that was passed in 1870 this man, although he had lost his citizenship by ten years' residence in this country, if he had not acquired another citizenship (and it is not suggested that he has), could have the citizenship of Germany given back to him, even though he remained here, on his mere application, and at the same time by s. 26 of the Act of 1913, if he proved that no blame attached to him, he would be at liberty to apply to the State to which he belonged for renationalization, and they would have no power to refuse. It is therefore quite plain that there still remain attached to this man certain ties by which he is bound to his native country. There are certain obligations that he might be called upon to discharge if he went back to his country; there are certain rights which he is entitled to enjoy if he chooses to remain away. In those circumstances I am unable to see that the applicant has discharged the burden that is cast upon him of showing that he has so completely divested himself of German nationality that he can be treated, for the purposes of this application, as though he no longer remained a German citizen.

EARL LOREBURN. My Lords, I am of the same opinion. Only one question has been argued in this appeal: has the applicant shown that he has divested himself of his original German nationality?

H. L. (E.) 1916

WEBER, *Ex parte.*

Earl Loreburn.

There is no question that originally he was a German subject. Has he shown that he has ceased to be a German subject by the evidence that he has brought forward in this case? If it is true that he is no longer tied by his allegiance, and, therefore, no longer liable, for example, to serve in the German army, why is that not stated in the affidavit which has been before your Lordships? That affidavit says that he has lost his German nationality—referring to the language of the German Act of Parliament in which that expression is used; but it is evident that there are qualifications under that German Act. It is evident that he retains some privileges in Germany, for example the privilege of readmission to full citizenship on certain conditions; and the statutes to which Mr. Schiller, in his most frank and proper argument, has referred point also to his retaining certain duties or obligations toward the German State. But the affidavit merely tells us, in the words of the Act, that he has lost his nationality, and says nothing to show that this is more than a verbal truth; indeed, when the Act is looked at it appears to be verbally true, but in substance not the whole truth.

My Lords, that seems to me sufficient to dispose of this appeal, and I will merely add one word. Until a man acquires a nationality other than that of his birth, it may be that he has not divested himself of the nationality of his birth, and that he cannot be a cosmopolitan. I do not desire to express any definite opinion upon that subject, because it is not necessary, and it is very undesirable to lay down broad propositions without full argument.

LORD ATKINSON. My Lords, I concur.

Order of the Court of Appeal affirmed and appeal dismissed.

Lords' Journals, February 17, 1916.

Solicitors: *Ellis, Leathley, Willes & Gavan Duffy.*

NOTE.—By the North German Nationality Law of June 1, 1870, s. 21 (Parliamentary Papers, Miscellaneous, No. 3, 1893, Cd. 7027) (extended by a statute of 1873 to the whole of the German Empire), "North Germans who leave the territory of the Confederation, and reside during ten years uninterruptedly in a foreign country, thereby lose their

citizenship. The aforesaid term is to be calculated from the moment the territory of the Confederation is left, or, if the person leaving is in possession of a passport or certificate of nativity, from the moment those papers cease to be valid. . . . ."

"To North Germans who have lost their citizenship by ten years' residence in a foreign country, and have not acquired another citizenship, the citizenship of their former native State can be granted afresh, even if they do not settle there.

"North Germans who have lost their citizenship by ten years' residence in a foreign country, and thereafter return into the territory of the North German Confederation, may acquire citizenship in that State of the Confederation in which they may have settled, by a certificate of admission issued by the higher administrative authority, which must be granted to them on application."

By the German Military Law of May 2, 1874, s. 11, "persons who have left the territory of the Empire and have lost their German nationality, but have not acquired another nationality ('*Staatsangehörigkeit*'), or have lost it again, are bound to present themselves for service in the event of their coming to settle in Germany but cannot be retained in service in time of peace after they have completed their thirty-first year."

By the German Imperial and State Nationality Law of July 22, 1913 (Parliamentary Papers, Miscellaneous, No. 3, 1914, Cd. 7277), s. 13, "A former German, who has not settled in Germany ['*im Inland*'] may be naturalized on his application by the Federal State to which he formerly belonged if he fulfils the requirements of § 8, paragraph 1, Nos. 1, 2. . . . . The Imperial Chancellor is to be informed before naturalisation; naturalisation does not take place if the Imperial Chancellor raises objections."

The requirements above referred to were that he should be capable of transacting business and that he should have led an irreproachable life.

By s. 26, "a German liable to military service who has neither his domicil nor his permanent residence in Germany ['*im Inland*'] loses his nationality on the completion of his thirty-first year if, up to that time, he has not caused a definite decision to be taken with regard to his liability to military service and if he has not been put back beyond that time." (The second paragraph related to German deserters.) "Any person who has lost his nationality under the provisions of paragraph 1 or 2 may only be naturalised by a Federal State after consultation with the military authorities. If he proves that no blame attaches to him, the Federal State to which he formerly belonged may not refuse to naturalise him."

By s. 31, "A former German, who before this law comes into force, has lost his imperial nationality in accordance with § 21 of the law of the 1st June, 1870, respecting the acquisition and loss of Federal and State nationality (*Bundesgesetzblatt*, p. 355) by a ten years' residence abroad, must be naturalised by the Federal State in the territory of which he has settled if he does not belong to any other State."

[HOUSE OF LORDS.]

H. L. (I.)* 1915 *Dec.* 10.

HOLLINSHEAD . . . . . APPELLANT;

AND

HAZLETON . . . . . RESPONDENT.

Bankruptcy—Salary of Member of Parliament—Appropriation for Benefit of Creditors—Bankruptcy (Ireland) Amendment Act, 1872 (35 & 36 *Vict. c.* 58), s. 51.

The annual payment of 400*l.* to members of Parliament under the resolution of the House of Commons of August 10, 1911, is "salary or income" within s. 51 of the Bankruptcy (Ireland) Amendment Act, 1872, and, therefore, where a bankrupt is a member of Parliament, the Court may make an order appropriating a portion of his salary for the benefit of his creditors.

Order of the Court of Appeal in Ireland [1915] 2 I. R. 425 reversed.

APPEAL from an order of the Court of Appeal in Ireland (1) reversing an order of Boyd J., sitting in bankruptcy.

The question raised by the appeal was whether it was competent for the Court under the Bankruptcy Statutes affecting Ireland to make an order appropriating (in whole or in part) the salary of a bankrupt member of Parliament for the benefit of his creditors.

The salaries of members of Parliament were paid in pursuance of the following resolution of the House of Commons passed on August 10, 1911: "Resolved, that in the opinion of this House provision should be made for the payment of a salary at the rate of 400*l.* a year to every member of this House, excluding any member who is for the time being in receipt of a salary as an officer of the House, or as a Minister, or as an officer of His Majesty's Household." The money required for the payment of those salaries was provided by the yearly Appropriation Acts.

At the general election of December, 1910, the respondent was elected a member of Parliament for North Galway and also for North Louth, but as regards the latter constituency he

* *Present:* LORD ATKINSON, LORD SHAW OF DUNFERMLINE, LORD PARKER OF WADDINGTON, and LORD SUMNER.

(1) [1915] 2 I. R. 425.

was unseated on petition on the ground that through his agents he had been guilty of corrupt and illegal practices, and he was ordered to pay the costs of the election petition. On May 20, 1914, the petitioners commenced an action against the respondent in England in the King's Bench Division for the said costs and interest thereon amounting to 2156*l.* 15*s.* 7*d.* On May 22, 1914, the writ was served on the respondent, who entered a conditional appearance on May 29.

On May 26 the respondent accepted the stewardship of the Chiltern Hundreds and vacated his seat for North Galway with a view to getting himself made bankrupt, and on June 5 he was adjudicated a bankrupt in Ireland on his own petition. The sole creditors in the bankruptcy were the petitioners in the election petition. On July 28, 1914, the respondent was re-elected to Parliament for the North Galway constituency, and he still represented that constituency.

On February 19, 1915, Boyd J., upon the application of the assignees in the bankruptcy, made an order for payment by the respondent out of his salary or income as member of Parliament for the division of North Galway to the appellant, the official assignee of the Court, of the sum of 200*l.* yearly in four quarterly instalments of 50*l.* each on January 1, April 1, July 1, and October 1 of each year, to be applied by the official assignee in discharge of the debts due in the bankruptcy, the first payment to be made out of that portion of the salary or income payable to the respondent on April 1, 1915.

This order was unanimously reversed by the Court of Appeal in Ireland; by the Lord Chancellor and the Lord Chief Baron on grounds of public policy, and by the Master of the Rolls on the ground that the payments to members were not salary or income in the nature of a salary within s. 51 of the Bankruptcy (Ireland) Amendment Act, 1872, but were in the nature of a voluntary allowance.

1915. Nov. 11, 12, 19. *T. M. Healy, K.C.* (of the Irish and also of the English Bar), and *Hanna, K.C.* (of the Irish Bar) (with them *D. B. Sullivan* (of the Irish Bar)), for the appellant. The question is whether under the Irish Bankruptcy Acts the salary of a bankrupt member of Parliament can be appropriated by the

H. L. (I.) 1915

HOLLINSHEAD v. HAZLETON.

Court for the benefit of his creditors. Under s. 319 of the Irish Bankrupt and Insolvent Act, 1857, the Court may order the pay, half-pay, salary, or pension of a bankrupt officer or civil servant, subject to the consent of the chief officers of the department to which the bankrupt belongs, to be applied in payment of his debts, and under s. 51 of the Bankruptcy (Ireland) Amendment Act, 1872, in respect of any salary or income not included in s. 319 of the Act of 1857 the Court has an unfettered power of appropriation. Similar provisions in a more workmanlike form are contained in the English Bankruptcy Act of 1869, ss. 89, 90, since re-enacted in the Bankruptcy Act of 1883, s. 53, sub-ss. 1 and 2, and again re-enacted in the Bankruptcy Act of 1914, s. 51, sub-ss. 1 and 2. Every salary, assignable or otherwise, is property within the meaning of the Bankruptcy Acts and is vested in the assignee in bankruptcy subject to any special provisions relating to salaries. [They referred to ss. 51, 60, 90, 91, 178, 179, 267, 268, 298, 300, 301, 302, 312, 313, and 324 of the Act of 1857.] Sect. 319 of the Act of 1857, which provides that the salaries of certain officials can only be touched with the consent of the chief officers of the department, is not an enabling section, but is introduced in relief of the bankrupt. It has never been suggested that a member of Parliament is a civil servant, and, even if he is, he is not a civil servant under any of the classes enumerated in s. 319, and his salary, whether assignable or not, and whether property within the meaning of the Bankruptcy Acts or not, comes under s. 51 of the Act of 1872.

The salary of a member of Parliament is subject to no conditions, and if Parliament had desired to protect these salaries from bankruptcy some special provision would have been introduced for that purpose. Since these salaries have been created the Bankruptcy Act of 1914 has been passed, but it does not deal with the subject. By s. 32 of the English Act of 1883 a bankrupt is disqualified from being elected or sitting or voting as a member of the House of Commons, and this provision has been extended to Scotland by the Bankruptcy Frauds and Disabilities (Scotland) Act, 1884, re-enacted by the Bankruptcy (Scotland) Act, 1913, s. 183; but the Irish Act of 1872, although it provides that a member of Parliament on being adjudged a bankrupt is disqualified from sitting and voting, does not disqualify a bankrupt from being elected. The respondent,

taking advantage of this omission, vacated his seat for the purpose of being made a bankrupt and then sought re-election. As the provisions as to salaries are substantially the same in England and Ireland, it is permissible to see how these sections have been administered in England. *Wadling* v. *Oliphant* (1) shows that the salary of a bankrupt is property which vests in the assignee in bankruptcy. *In re Wicks* (2) decides that a purely voluntary allowance is not salary or income for the purpose of these sections, and the appellant does not contest that. *In re Huggins* (3), in which *In re Wicks* (2) was distinguished, is exactly like the present case. That case decided that the pension of a retired judge of a Crown Colony was "property" which vested in the trustee in the bankruptcy, but was "income" within s. 90 of the Bankruptcy Act, 1869, and subject to the power of the Court to determine how much of it should be set aside for the creditors of the bankrupt. That was a decision of a very strong Court; it has stood unquestioned for thirty-four years, and two Acts of Parliament have since been passed on the footing of its being law, and it ought to have been followed by the Court of Appeal in Ireland. In *In re Webber* (4) it was held that a compassionate allowance paid to an Indian officer on compulsory retirement, the recipient having no claim or right thereto, was not salary or income within s. 53 of the Act of 1883. That has no bearing on the present case. *In re Saunders* (5) shows that a pension, though made inalienable by legislation, may be appropriated in bankruptcy for the payment of creditors. [On this question they also referred to *Beckham* v. *Drake* (6); *Emden* v. *Carte* (7); *In re Hutton* (8); *In re Brindley* (9); *Crowe* v. *Price* (10); *Lucas* v. *Harris* (11); *In re Mirams* (12); *In re Shine* (13); *In re Rogers* (14); *In re Graydon* (15); *In re Ward* (16); *In re Roberts* (17); *Rose* v. *Buckett* (18); *Knill* v. *Dumergue* (19); *In re Lupton* (20);

(1) (1875) 1 Q. B. D. 145.
(2) (1881) 17 Ch. D. 70.
(3) (1882) 21 Ch. D. 85.
(4) (1886) 18 Q. B. D. 111.
(5) [1895] 2 Q. B. 424.
(6) (1849) 2 H. L. C. 579.
(7) (1881) 17 Ch. D. 768.
(8) (1884) 14 Q. B. D. 301.
(9) (1887) 4 Morrell, 104.
(10) (1889) 22 Q. B. D. 429.
(11) (1886) 18 Q. B. D. 127.
(12) [1891] 1 Q. B. 594.
(13) [1892] 1 Q. B. 522.
(14) [1894] 1 Q. B. 425.
(15) [1896] 1 Q. B. 417.
(16) [1897] 1 Q. B. 266.
(17) [1900] 1 Q. B. 122.
(18) [1901] 2 K. B. 449.
(19) [1911] 2 Ch. 199.
(20) [1912] 1 K. B. 107.

H. L. (I.) 1915 HOLLINS-HEAD v. HAZLETON.

O'Driscoll v. *Manchester Insurance Committee* (1); and on the question of the remedy for non-payment of the salary to *Rex* v. *Lords Commissioners of the Treasury* (2); *Rex* v. *Lords Commissioners of the Treasury, In re Smyth* (3); *Rex* v. *Lords Commissioners of the Treasury, In re Hand* (4); *Reg.* v. *Lords Commissioners of the Treasury* (5); *Kinloch* v. *Secretary of State for India* (6); *Reg.* v. *Inland Revenue Commissioners* (7); *Commissioners for Special Purposes of Income Tax* v. *Pemsel.* (8)]

There is no common law of bankruptcy and no question of public policy arises apart from the Acts. [They referred to 34 & 35 Hen. 8, c. 4; 13 Eliz. c. 7; 1 James 1, c. 15, s. 14; 21 James 1, c. 19, ss. 1, 4, 13; 5 Geo. 2, c. 30, ss. 1, 7; 6 Geo. 4. c. 16, ss. 11, 63, 135; Bankruptcy Act, 1861 (24 & 25 Vict. c. 134), ss. 69, 114, 134, 135, 141.] Assuming that any question of public policy arises, it is not a question of the dignity of the member but of the dignity of the House, and it cannot be for the dignity of the House that it should be an assembly of bankrupts. It is against public policy that a bankrupt, who in England and Scotland is disqualified from election to Parliament, should, if elected in Ireland, enjoy his salary free from the obligation of paying his debts. [On the question whether the salary of a member of Parliament was assignable they referred to the ancient practice of buying and selling offices (which involved that the salaries attached to such offices were assignable) and to the various statutes prohibiting that practice, namely, 5 & 6 Edw. 6, c. 16, ss. 4, 7; 49 Geo. 3, c. 126, ss. 7, 9, 12; 50 & 51 Vict. c. 55, s. 27; and also to 8 Edw. 7, c. 40, s. 6, and 7 Edw. 7, c. 56, ss. 11, 12, as showing that where it was intended to prevent assignment that was specially provided for by Parliament.]

Denis Henry, K.C., and *Hugh J. McCann* (both of the Irish Bar) (with them *Thomas Scanlan*), for the respondent. This payment to members is not "salary or income" within s. 51 of the Act of 1872, but is a voluntary allowance made by the House of Commons to its members out of the sum voted to the House for its expenses.

(1) (1914) 31 Times L. R. 103.
(2) (1835) 4 Ad. & E. 286.
(3) (1836) 4 Ad. & E. 976.
(4) (1836) 4 Ad. & E. 984.
(5) (1872) L. R. 7 Q. B. 387.
(6) (1882) 7 App. Cas. 619.
(7) (1884) 12 Q. B. D. 461.
(8) [1891] A. C. 531.

These salaries are paid by His Majesty under the Appropriation Acts. In the Appropriation Act of 1911 there is a separate vote for members' salaries, but in the Appropriation Act of 1912 this form was altered, and there was no segregation of these salaries, which were included under the head of "salaries and expenses of the House of Commons," and this form has been followed ever since. This is really a vote for an estate of the realm. The respondent is engaged upon the business of the State. It was never intended that the attendance of these Irish members should depend upon a dole given by the Court of Bankruptcy out of the 400*l.* allowed by the House. It is said that the effect of the Act of 1857 is to vest the salary of every one in the official assignee, but s. 267 of that Act is copied almost verbatim from s. 11 of 13 Eliz. c. 7, and in *Cathcart* v. *Blackwood* (1), cited in Cooke's Bankrupt Laws (8th ed.), p. 318, the House of Lords held that the half-pay of an officer in the Army was not liable to be attached on his bankruptcy for the benefit of his creditors, and, as the learned author says, that decision must be taken to have overruled an obiter dictum of Lord Hardwicke to the contrary. So in *Stone* v. *Lidderdale* (2) it was held that an assignment of the half-pay of an officer was bad in equity as well as at law; and in *Flarty* v. *Odlum* (3) Lord Kenyon held that the half-pay of an officer could not be assigned for the benefit of his creditors on his insolvency, on the grounds that "emoluments of this sort are granted for the dignity of the State, and for the decent support of those persons who are engaged in the service of it," and that "an officer has no certain interest in his half-pay." That reasoning applies to the present case. This point, however, is not very important, because, assuming that this payment is a salary, the real question turns upon s. 319 of the Act of 1857 and s. 51 of the Act of 1872. This salary was enjoyed under the department of the Treasury and falls within the words of s. 319. The policy of the Legislature in that section was not to take away the salaries of these civil servants on the mere order of the Court of Bankruptcy, but only on the consent of the heads of the department. This 400*l.* has not been shown to be more than is

(1) Feb. 25, 1765. (2) (1795) 2 Anst. 533.
(3) (1790) 3 T. R. 681.

H. L. (I.) 1915

HOLLINS-HEAD v. HAZLETON.

required to enable the respondent to discharge his duties as a member of Parliament.

The House took time to consider.

Dec. 10. LORD ATKINSON. My Lords, this is an appeal from an order of the Court of Appeal in Ireland, dated May 10, 1915, discharging an order of the King's Bench Division (in Bankruptcy), dated February 19, 1915.

This latter order was made on the motion of the official assignees in the bankruptcy of the respondent, and directs that he (the respondent) should, out of his salary or income as a member of Parliament for the division of North Galway, pay to the appellant, the official assignee of the Court, the sum of 200*l.* yearly, in four quarterly instalments of 50*l.* each, on the 1st day of January, 1st day of April, 1st day of July, and 1st day of October in each year, the first payment to be made by the respondent out of that portion of said salary or income payable to him on or about the 1st day of April, 1915.

The order purports to be made in exercise of the jurisdiction conferred by s. 51 of the Bankruptcy (Ireland) Amendment Act, 1872 (35 & 36 Vict. c. 58), which is practically identical with the 90th section of the English Bankruptcy Act of 1869, re-enacted in s. 53, sub-s. 2, of the English Bankruptcy Act of 1883 (46 & 47 Vict. c. 52), and again re-enacted in s. 51, sub-s. 2, of the Bankruptcy Act of 1914.

The English authorities, therefore, dealing with the construction of these several sections appear to me to apply to the construction of the Irish enactment under which the order of February 19 was made. It will be observed that this last-mentioned order does not purport to attach the quarterly payment of the respondent's salary (to give it its statutory name) before it reaches him, but merely directs him to pay out of the quarterly payments, when received, the sums mentioned. The dates in this case are instructive.

The respondent, who in or about the month of December, 1910, was elected parliamentary representative for the North Louth Division of the county of Louth, was unseated on petition by the order of the election judges, dated February 27, 1911, and costs

were awarded against him. These costs were taxed on March 18, 1914, to the amount of 1910*l.* 8*s.* 1*d.*, with interest at 4 per cent. per annum from February 27, making together 2156*l.* 15*s.* 7*d.* This sum was due to the four persons by whom the election petition was presented. It constitutes the only liability of the bankrupt.

On May 20, 1914, a writ was issued by these four persons against the respondent to recover the above mentioned sum of 2156*l.* 15*s.* 7*d.* with interest till paid. The writ, together with the statement of claim, was served upon him on May 22, 1914. An appearance was entered by him on May 29, and judgment was marked on June 17 for the amount claimed with costs. The respondent was, however, active in the meantime. He on May 26 accepted the office of the stewardship of the Chiltern Hundreds, thereby vacating the seat he then held as member of Parliament for the constituency of North Galway. On June 5, 1914, he presented his petition in bankruptcy at 11.45 in the morning, upon which a final order was made on the same day, by which he was adjudged a bankrupt. The business was quickly done.

It is admitted that had the respondent's bankruptcy been an English bankruptcy he would, under the 32nd section of the Bankruptcy Act of 1883, while his bankruptcy remained unannulled, or he had failed to obtain from the Court a certificate to the effect that his bankruptcy was brought about by misfortune, without any misconduct on his part, have been disqualified for, amongst other things, being elected to, sitting, or voting in the House of Commons or any committee thereof; and that, under s. 33, if either of these things took place within six months from the date of the order declaring him a bankrupt, on the Court of Bankruptcy certifying that fact to the Speaker, his seat would have become vacant. But it is admitted, as I understood, that though the words of sub-s. 3 of this s. 32 provide that the disqualifications imposed by the section shall extend to all parts of the United Kingdom, yet, as the statute only deals with proceedings in the Courts of Bankruptcy in England, these words do not apply to Irish bankruptcy proceedings, and the point is not raised in this appeal.

The Irish Act of 1872 is less stringent. By its 40th section it provides that "if a person having privilege of Parliament commits an act of bankruptcy he may be dealt with under this Act in like

H. L. (I.) 1915

HOLLINS-HEAD v. HAZLETON.

Lord Atkinson.

manner as if he had not such privilege." A provision similar to this has been introduced into the Bankruptcy Act of 1914. Sect. 41 of the Irish Act provides that if a person, being a member of the Commons House of Parliament, is adjudged bankrupt he shall be, and remain during one year from the date of the order for adjudication, incapable of sitting and voting in that House unless within that time either the order be annulled or the creditors who have proved be fully satisfied.

If neither of these things should happen within that period, then, on the Court of Bankruptcy certifying that fact to the Speaker, the bankrupt's seat becomes vacant.

Well, the respondent, obviously to evade the letter of this section, plainly designed to exclude bankrupts from active co-operation in parliamentary proceedings, having vacated his seat on May 26, got re-elected for the same constituency on July 28, and became a bankrupt on his own petition in the interval while he was not a member of Parliament. Accordingly he is qualified to sit and vote in the House, bankrupt though, in fact, he be, and his counsel contend that there is an imperious principle of public policy which demands that he should be permitted to continue to receive the entire of his salary and devote it to his own purposes, since it was, as it is said, given to him to support the dignity of his position as a member of Parliament and to enable him to discharge the duties of that post.

There is, however, another principle of public policy, which has found expression in the provisions of the Bankruptcy Codes of both England and Ireland for close on half a century, as estimable and as conducive to the welfare of the community as any. It is this, that in bankruptcy the entire property of the bankrupt, of whatever kind or nature it be, whether alienable or inalienable, subject to be taken in execution, legal or equitable, or not so subject, shall, with the exception of some compassionate allowances for his maintenance, be appropriated and made available for the payment of his creditors.

It will be found, I think, that in these Bankruptcy Codes whenever these two principles come in conflict the latter prevails. Of this s. 319 of the Irish Act of 1857 is a striking example.

On August 10, 1911, the following resolution was passed by the

House of Commons : " Resolved, that in the opinion of this House, provision should be made for the payment of a salary at the rate of 400*l.* a year to every member of this House, excluding any member who is for the time being in receipt of a salary as an officer of the House, or as a Minister, or as an officer of His Majesty's Household."

It is to be observed that no condition whatever is attached to the payment of this salary. The members may be qualified to sit and vote in the House or be disqualified to do either, as the respondent would have been had he become bankrupt while he was, in fact, a member. They may attend the sittings of the House or absent themselves continuously from them ; they may be rich or poor ; resident in some distant part of the three kingdoms or within five minutes' walk of the House itself.

If, therefore, these salaries had, as is contended, been given to enable members to discharge, or to secure that they did discharge, their duties, one would, not unnaturally, have expected to find some provision to the effect that a member should forfeit his salary for the six or twelve months, as the case might be, during which he was disqualified from sitting or voting in the House, or that the payment of his salary was made conditional on his attending in his place in the House for the whole or a certain portion of each session. There is nothing of that kind to be found in it. It is an error, I think, to suppose that there is now available any effective legal or parliamentary machinery to compel members to attend the sitting of the House.

The only statute I have been able to find dealing with the matter is the 6 Hen. 8, c. 16. It provides that members who depart from Parliament without the leave of the Speaker and the members of the House will lose all the money they should have (I use the words of the statute) for their " wages," and that the counties and boroughs for which they have been elected shall be discharged for ever from the liability to pay them wages. That was the only penalty.

What was the precise amount of these wages at the time this statute was passed I have not been able to ascertain. It is stated in May's Parliamentary Practice, 6th ed., p. 25, that the wages were in the time of Edward III. 4*s.* per day for a knight of the shire, and 2*s.* per day for a citizen or burgess.

The statute of 5 Rich. 2, c. 4, which required any person summoned

H. L. (I.) 1915

HOLLINS-HEAD v. HAZLETON.

Lord Atkinson.

to Parliament to attend, or, in the absence of a reasonable or honest excuse, to be amerced, is now repealed.

The practice of "calling" the House has long since ceased to find favour, and in no case has it been resorted to since the year 1836. A member may, no doubt, in justice to his constituents, be morally, though not legally, bound to attend the sitting of the House.

It is well established that in a Court of law the motives which influenced the Legislature in passing any particular enactment, or the purposes or objects it desired to effect, can only be legitimately ascertained from the language of the enactment itself viewed through the light of the circumstances in reference to which that language was used: see Lord Blackburn's judgment in *River Wear Commissioners* v. *Adamson*. (1) The reports of the debates leading up to the passing of it cannot be looked at. The same rule of construction must, I think, be applied to the resolutions passed by either House of Parliament. When these motives, purposes, or objects are not, expressly or impliedly, revealed in language of the Legislature in its statute, or by either of the Houses of Parliament in that of its resolutions so viewed, it is, I think, wholly illegitimate to surmise or conjecture what those unrevealed motives, purposes, or objects may have been, and to construe and apply the statutes or resolutions as if they had been indicated.

There is nothing whatever contained in this resolution to suggest what was the special motive or object of the House of Commons in passing it. One simply finds that the House, in effect, granted a salary to each member unconditionally in all respects. That is all. I must therefore, for myself, decline to speculate upon this point, and, for the purposes of this judgment, to accept or be guided by the speculations of the Court of Appeal on the subject.

The Appropriation Act for the year 1911 received the Royal assent on August 18, 1911, eight days after the passing of this resolution. In Sched. B, Part 7, Class II., of the Civil Services, the item 1*a* appears. It runs thus: "For the salaries of members of the House of Commons not in receipt of salaries as Ministers, as officers of the House, or as officers of His Majesty's Household, 252,000*l*." In all subsequent Appropriation Acts this sum does

(1) (1877) 2 App. Cas. 743, 763.

not appear as an independent item, but is included, and, indeed, concealed, in one general item, as, for instance, in the Appropriation Act of 1913, where it runs thus: "Salaries and expenses of the House of Commons, 298,322*l.*," but a glance at the Estimates shows that of this sum 252,000*l.* is provided for members' salaries.

When money is so voted and appropriated the Crown is bound to devote it to the object named in the statute, and under the 14th section of the Exchequer and Audit Departments Act, 1866 (29 & 30 Vict. c. 39), the mode of procedure adopted is this. By Royal Order under the Sovereign's sign manual, countersigned by the Treasury, he or she directs the Treasury to pay the sum so appropriated to the respective services named. This applies to all salaries voted by Parliament. In so doing the Treasury merely act as the servants and agents of the Crown. It is the Crown, not the House of Commons, that pays. The payment is compulsory, not voluntary. The House of Commons has passed the resolution once for all. It may rescind it, no doubt, any day. In that sense the payment of the salaries is contingent and not assured, but not more contingent or less assured than the payment of the salaries of all the officers of the Crown, who may be dismissed at pleasure.

Palles C.B. in his judgment laid it down that this sum of 400*l.* per annum is expressly given to each member of Parliament virtute officii, and is payable out of State funds to enable them to support the office with the degree of dignity due to it, and for that reason is inalienable.

It is certainly given to the members because they are members, but, with infinite respect for that most distinguished judge, I doubt very much whether membership of the House of Commons is, within the meaning of the principle of law and public policy to which he refers, an office of State at all.

This, however, might be a matter of importance if the question to be determined in this case were whether these salaries could be assigned or be taken in equitable execution; but it is, in my view, as the authorities show, wholly immaterial upon the question whether they can be made available in whole or in part, under the bankruptcy laws, to satisfy the claims of creditors.

I turn to the consideration of the statutes themselves. By the Irish Bankruptcy Act of 1857 the Irish bankruptcy and insolvency

H. L. (I.) 1915

HOLLINSHEAD v. HAZLETON.

Lord Atkinson.

laws were consolidated. The great majority of its sections are still in force. I shall only refer to those which are. Sect. 59 provides for the appointment of official assignees; s. 267 provides that when any person shall be adjudged a bankrupt, or on filing a petition of insolvency by an insolvent, if the Court shall make an order thereon that the insolvent shall file his schedule, &c., "all the personal estate and effects of such bankrupt or insolvent, present and future, wheresoever the same may be, and all property which he may purchase, or which may revert, descend, be devised, or bequeathed or come to him, before such bankrupt shall have obtained his certificate or such insolvent shall have become entitled to his final discharge in pursuance of the adjudication made in that behalf, and all debts due or to be due to him, shall become absolutely vested in the assignees for the time being for the benefit of the creditors."

These words could scarcely be wider. They cover everything received which the bankrupt can retain and employ for his own use and benefit.

This section is followed by what has been described as a compassionate section, No. 298, whereby a bankrupt or insolvent is declared to be entitled to retain such tools and household furniture as he may select not exceeding 20*l.* in value, and the Court is empowered to make such an allowance to him out of his estate as may be necessary for the support and maintenance of himself and his family.

Then comes s. 319, upon which much turns in this case. It provides that "the Court may order such portion of the pay, half-pay, salary, emolument, or pension of any bankrupt or insolvent as, on communication from the Court to the Secretary-of-War, or the Lords Commissioners of the Admiralty, or the Commissioners of the Customs or Excise, or the chief officers of the department to which such bankrupt or insolvent may belong or may have belonged, or under which such pay, half-pay, salary, emolument, or pension may be enjoyed by such bankrupt or insolvent, or to the Court of Directors of the East India Company, they respectively may, under their hands, or under the hand of their respective chief secretary, or other chief officer for the time being, consent to, in writing, to be paid to the official assignee, in order that the same

may be applied in payment of the debts of such bankrupt or insolvent . . . ."

On the lodgment of the order of the Court, with the consent before mentioned, with the Paymaster-General or any other person appointed to pay the pay, half-pay, &c., as aforesaid, the sum mentioned is to be paid to the official assignee. It is obvious that this section, which is to the same effect as the 89th section of the English Bankruptcy Act of 1869, applies to a large number, perhaps the majority, of the servants of the State, and it must be assumed, I think, that the salaries they receive are not excessive having regard to the duties to be performed ; but no matter how important the offices may be, how vital in the interest of the State the discharge of those duties, how necessary the receipt of the pay or salary to enable the duties to be discharged, the salary, pay, or half-pay may be appropriated in whole or in part for the payment, in bankruptcy, of creditors.

Thus the principle of public policy embodied in this and other sections of the Bankruptcy Codes prevails over any principle of public policy, which would put these salaries, &c., beyond the reach of creditors.

Pensions, when given exclusively for past services, are alienable ; half-pay is inalienable and cannot be taken in equitable execution. In *Lucas* v. *Harris* (1) Lindley L.J. deals with all the authorities on this point ; but both pensions and half-pay are expressly named in the section, though the public policy which is relied upon to keep the salaries of members of Parliament safe from the claims of creditors in bankruptcy will be found to be the very same public policy which, though it makes half-pay inalienable, yet does not protect it from the claims of such creditors. The principle upon which half-pay is rendered inalienable is laid down by Lord Kenyon in *Flarty* v. *Odlum* (2) and in *Lidderdale* v. *Duke of Montrose* (3) and approved of by Parke B. in *Wells* v. *Foster*. (4) In the first of these cases a military officer on half-pay made an assignment of his half-pay. Lord Kenyon said : " Emoluments of this sort are granted for the dignity of the State, and for the decent support of those persons who are engaged in the service of it. It would

(1) 18 Q. B. D. 127.
(2) 3 T. R. 681, 682.
(3) (1791) 4 T. R. 248.
(4) (1841) 8 M. & W. 149.

H. L. (I.) 1915

HOLLINS-HEAD v. HAZLETON.

Lord Atkinson.

therefore be highly impolitic to permit them to be assigned; for persons, who are liable to be called out on the service of their country, ought not to be taken from a state of poverty. Besides an officer has no certain interest in his half-pay; for the King may at any time strike him off the list."

In this last respect the officer on half-pay is not in any different or worse position from that of every ordinary military or civil servant of the Crown. They all hold their offices at the pleasure of the Crown, and may, at law, be arbitrarily dismissed at any moment. Indeed any contract entered into between an authority representing the Crown and a subject, though it purport to appoint the latter to an office for a definite period, must be held to have imported into it a condition that the Crown has this power of arbitrary dismissal: *Dunn* v. *Reg.* (1); *Gould* v. *Stuart.* (2)

Wells v. *Foster* (3) was the case of a civil officer to whom compensation was granted on the reduction of offices in his department. Lord Abinger C.B., in delivering judgment, said (4) "this pension was not assignable. It stands upon the same footing as the half-pay of an officer in the Army. It is fit that the public servant should retain the means of a decent subsistence, without being exposed to the temptations of poverty. Besides, the defendant may be assigning what he has no right to receive; for his pension subsists only during pleasure, and it depends on Parliament whether it shall be continued or not." Parke B. said (5): "It is not necessary in this case to determine whether this is an allowance to which the defendant is entitled as a matter of indefeasible right, or whether it is payable only during pleasure; although I have a strong impression that it subsists only during the joint pleasure of the Treasury and of Parliament, by which the fund for its payment is provided. On the other hand, even if it be payable only during pleasure, it appears to me that it is not therefore, in point of law, the less assignable, however little its value would be in consequence of its being liable to be withdrawn at any moment. But viewing the matter on the ground of public policy, we are to look not so much at the tenure of this pension, whether it is held for life or during pleasure, as

(1) [1896] 1 Q. B. 116.
(2) [1896] A. C. 575.
(3) 8 M. & W. 149.
(4) Ibid. 151.
(5) Ibid. 151, 153.

whether it is, in either case, such a one as the law ought to allow to be assigned. The correct distinction made in the cases on this subject is, that a man may always assign a pension given him entirely as a compensation for past services, whether granted to him for life, or merely during the pleasure of others. . . . . But where the pension is granted not exclusively for past services, but as a consideration for some continuing duty or service, although the amount of it may be influenced by the length of the service which the party has already performed, it is against the policy of the law that it should be assignable." He proceeds thus : " I think the true view of this case is, that the defendant is still to be considered as in the public service, although not at present actually performing any duty in it ; and that the compensation allotted to him under this Act is by way of salary, the object of which is to enable him to maintain such a position in life as will save him from the necessity of risking his character, by incurring those temptations which persons reduced to poverty are necessarily exposed to, and which would render him an unfit person to be again employed as a servant of the Crown. For this purpose, public policy requires that he should not be permitted to assign it away." This is the very same principle of public policy invoked to sustain the judgment appealed from.

In the case of *Lucas* v. *Harris* (1) it was decided that the pension of Indian officers made inalienable by the joint operation of an Indian statute and the 141st section of the Army Act of 1841 could not be taken in equitable execution ; but in the case of *In re Saunders* (2) it was pointed out by Kay L.J. that the case of *Lucas* v. *Harris* (1) was not a bankruptcy case at all, and did not touch, therefore, the operation of any section of the Bankruptcy Statutes.

But wide as are the terms of this s. 319 of the Irish Act of 1857 and of those of the corresponding section of the English Bankruptcy Act of 1869, they were not considered wide enough to afford adequate protection to creditors, and accordingly by the following section (s. 90) of the English Act it was provided that " Where a bankrupt is in receipt of a salary or income other than as aforesaid, the Court upon the application of the trustee shall from time to time make such order as it thinks just for the payment of such salary or income

(1) 18 Q. B. D. 127. (2) [1895] 2 Q. B. 424, 428.

H. L. (I.) 1915

HOLLINS-HEAD v. HAZLETON.

Lord Atkinson.

or of any part thereof, to the trustee during the bankruptcy, and to the registrar if necessary after the close of the bankruptcy, to be applied by him in such manner as the Court may direct."

This section is re-enacted as s. 53, sub-s. 2, of the Bankruptcy Act of 1883, and as s. 51, sub-s. 2, of the Bankruptcy Act of 1914. The law of Ireland was attempted to be assimilated by the 51st section of the Bankruptcy (Ireland) Amendment Act of 1872. It provides that " When a bankrupt is in receipt of a salary or income, other than is mentioned in the three hundred and nineteenth section of the said Act" (i.e., the Act of 1857), "the Court may, from time to time, make such order as it thinks just for the payment of such salary or income, or any part thereof, to the official assignee or the trustee, to be applied by him in such manner as the Court shall direct; and thereupon such portion of such salary or income as shall be specified in such order shall be paid to such official assignee, until the Court shall make order to the contrary."

This section is general in its terms. It is expressly made to apply to every case not coming within s. 319, and I am, with all respect, wholly unable to concur with the Irish Master of the Rolls in thinking that it must be held to be confined to persons not officers of State; because if it applied to such officers as salaried members of Parliament there would be no person or body who could give the consent required by s. 319.

It appears to me unsound to assume that any consent such as is required by that section is necessary in any case coming within s. 51. There is nothing in this last-named section to suggest the necessity for any consent, and as it is expressly directed to cases falling without the scope or reach of s. 319, which does require consent, I do not think the necessity for consent can be implied.

The case of *In re Saunders* (1) is an important one. It has a direct bearing on each of the two points raised by the respondent in this appeal. First, the alleged want of jurisdiction of the bankruptcy judge to make the order he made, and, second, the alleged oppressive exercise of his jurisdiction as to the amount of the pension ordered to be paid over to the official assignee. In the case of *In re Saunders* (1) a major-general of the Madras Staff Corps who was liable to be recalled to service on an emergency had been granted

(1) [1895] 2 Q. B. 424.

a pension of 330*l.* a year net in respect of his military service in India. This pension was rendered inalienable by an Indian statute, as it certainly would also have been on the principle of public policy relied on by the respondent.

An order was made by the county court judge of Wandsworth directing that a portion of the pension (it does not appear how much) should be paid to the trustee in bankruptcy of this military officer.

On appeal to the Divisional Court, composed of Vaughan Williams J. and Kennedy J., as they then were, this order was reversed on the ground that, although there was jurisdiction to make the order, such an order should never be made in the case of an Indian pension, which was intended to be made inalienable by the Indian legislation.

On appeal to the Court of Appeal, composed of Lord Esher M.R., Kay and A. L. Smith L.JJ., it was held that the county court judge had jurisdiction under s. 53, sub-s. 2, of the Bankruptcy Act of 1883 to make the order; that there was no rule of law that in the case of an Indian pension such an order should never, as an exercise of discretion, be made; that the discretion to make the order was absolute, and should be exercised in each case according to the facts of that particular case.

The appeal was dismissed, but upon the grounds put by Kay L.J. (1), namely, that as the county court judge had exercised his discretion one way and the Divisional Court their discretion in another way, they must look at the facts of the particular case, and, without attempting to lay down any rule which would fetter another Court in exercising its discretion under s. 53, must say how the discretion should be exercised in that particular case. The Court ultimately held that as the bankrupt had no means other than his pension to maintain himself, his wife, and his family, and that as the only property his wife had was a freehold worth 500*l.*, it would not be a proper exercise of discretion to order any portion of the pension to be set aside for the trustee.

It will be observed that this was not a proceeding under s. 53, sub-s. 1, of the Bankruptcy Act of 1883, which is analogous to s. 319 of the Irish Act of 1857, but a proceeding under sub-s. 2 of

(1) [1895] 2 Q. B. 427.

H. L. (I.) 1915

HOLLINS-HEAD v. HAZLETON.

Lord Atkinson.

that section, which is analogous to s. 51 of the Irish Act of 1872' under which Boyd J.'s order was made.

If the reasoning of the judgment appealed from were sound it would have been competent for the bankrupt, Saunders, to have said, "I am a servant of State liable to be called up again for active service. My pension was not given to me solely for past services. It is presumably, and is in fact, only sufficient to support my dignity in that position and keep me fit to answer the call when made. Hands off. My pension is inalienable. You have no jurisdiction to touch it." But five most distinguished judges have decided that the county court judge had jurisdiction to touch it. They differed from him only as to the mode and manner in which his jurisdiction should be exercised.

Incidentally, too, the case answers the objection of the Master of the Rolls. The bankrupt was an officer of the Army. He was dealt with under sub-s. 2 of s. 53, not sub-s. 1. No consent of any person or department was shown to have been given, for none was required.

For myself I fail to see anything in the Irish statutes requiring that s. 51 of the Act of 1872 should receive a different construction from s. 53, sub-s. 2, of the English statute of 1883.

A great number of cases were cited by Mr. Healy, who appeared for the appellant. Many of them are merely illustrations of the application of the same principle. I do not intend to analyse more than a few of them. I begin with *In re Huggins*. (1) The bankrupt was a retired judge of a Crown Colony to whom the Secretary of State for the Colonies had granted a pension which was voted annually by the Legislature of the Colony and was included in the annual Appropriation Ordinance of the Colony. The bankrupt was not liable to be called upon to fill again any public office or situation under the Crown. The Secretary of State declined to recognize assignments of such pensions, following therein the practice of the Treasury in England in relation to pensions granted to members of the Civil Service.

Mr. Registrar Brougham made an order restraining the bankrupt until further order from receiving the pension, and directing that the trustee should until further order receive the quarterly payments of the pension as they should become due.

(1) 21 Ch. D. 585.

The bankrupt appealed. The case turned upon the construction of the 89th and 90th sections of the English Bankruptcy Act of 1869. It was decided by Sir George Jessel, Lindley L.J. (as he then was), and Bowen L.J. It is, therefore, a case of high authority.

The two points pressed in argument on behalf of the appellant were (1.) that the pension was inalienable, and (2.) that the payment of it could not be enforced at law, and was, therefore, a mere payment by way of bounty and did not come within either of these sections, and *In re Wicks* (1) and *Cooper* v. *Reg.* (2) were cited.

Sir George Jessel attached importance to the fact that the group of sections from 87 to 95 were headed "As to property devolving on Trustee." In the Irish statute of 1872 the group of sections from 50 to 55, both inclusive, are headed somewhat similarly "Power of Court in relation to Property." He says (3): "The vote of the Legislature is merely the mode of ascertaining the annual sum which the Colony has to pay. Just in the same way the salaries and pensions of servants of the Crown in this country cannot be paid until they are voted by Parliament, and yet no one would say they are not the property of the person who receives them. There are, no doubt, some salaries and pensions which are not assignable. But when this is so it is always referable to one of two grounds. It is said to be contrary to public policy that payments made to induce persons to keep themselves ready for service to the Crown, as the half-pay of officers in the Army or Navy, or payments for actual service rendered to the Crown, should be assigned. The other class of cases is that of pensions, like the retiring allowance of a beneficed clergyman, which are by statute expressly made not assignable. But still I think these are all property. The large definition of 'property' given in section 4 of the Bankruptcy Act goes far beyond choses in action. My view of the meaning of the provisions of the Bankruptcy Act is this. Sections 15 and 17 vest all the 'property' of the bankrupt in the trustee," saving some express exceptions.

Then he proceeds to say that this vesting is subject to the provisions in the group of sections from 87 to 95, and holds that the pension of the bankrupt is income, not salary, within the meaning

(1) 17 Ch. D. 70. (2) (1880) 14 Ch. D. 311.
(3) 21 Ch. D. 91.

H. L. (I.) 1915

HOLLINS-HEAD v. HAZLETON.

Lord Atkinson.

of the 90th section, and, therefore, that the order of the registrar was right.

Lindley L.J. also held that the pension was " property " divisible amongst the bankrupt's creditors and vested in the trustee. He said (1): " The different kinds of property . . . . vest in the trustee, but subject to the modifications and qualifications contained in this group of sections " (i.e., 87 to 95). " Sects. 89 and 90 are the only ones which are material for the present purpose. Is this bankrupt ' in the receipt of a salary or income other than as aforesaid ' ? His pension is not a ' salary,' inasmuch as he is not bound to render any services in respect of it. But why is it not ' income ' ? Surely it is income in every sense of the word. It is not, as in *Ex parte Wicks* (2), a mere voluntary allowance, revocable at any time ; it is not an arbitrary allowance which can be stopped at any time at the will of the person who pays it. In my opinion it is within the true meaning of the word ' income ' in sect. 90."

I have already pointed out the very wide words of the vesting section in the Act of 1857.

In re Ward (3) was the case of a military officer who had retired from the Army but was, under art. 1057 of the Royal Warrant of 1887, in receipt of " retired pay." He was on the non-effective list, so this pay was different from half-pay. If placed upon the active list again he might be called up to serve in the case of emergency. It was held that this " retired pay " was received in respect of services which this officer had rendered in the past, not in respect of those rendered on active employment, that it consequently fell within s. 53, sub-s. 2, and no consent such as mentioned in the preceding sub-section was necessary.

Lord Esher in the course of the argument said *In re Wicks* (2) had no bearing on the case. I have not been able to find that *In re Huggins* (4) or *In re Saunders* (5) have ever been questioned, while they have been many times approved of. I do not think that the principle of public policy, which, in the case of officers on half-pay, is disregarded in bankruptcy, in order that the claims of creditors may be satisfied, can legitimately be invoked in such a

(1) 21 Ch. D. 93.
(2) 17 Ch. D. 70.
(3) [1897] 1 Q. B. 266.
(4) 21 Ch. D. 85.
(5) [1895] 2 Q. B. 424.

case as the present to defeat the claims of similar creditors. I am, therefore, clearly of opinion that if this sum of 400*l.* be either "salary" or "income" within the meaning of the 51st section of the Irish Act of 1872, Boyd J. had jurisdiction to make the order of February 19, 1915.

The question then remains, What is the character of these payments? They are not merely gratuities, or arbitrary voluntary payments, which the authority making them, the Crown, can at any moment stop. That is clear, I think. The Crown is bound by statute to make them. They are expressly styled, both in the resolution and the Appropriation Act, 1911, salaries. In *In re Shine* (1) Fry L.J. endeavoured to give a definition of salary, which he admitted was not complete. He said: "Whenever a sum of money has these four characteristics—first, that it is paid for services rendered; secondly, that it is paid under some contract or appointment; thirdly, that it is computed by time; and fourthly, that it is payable at a fixed time—I am inclined to think that it is a salary, and not the less so because it is liable to determination at the will of the payer, or that it is liable to deductions."

The word "appointment" in this definition renders it a little difficult to apply it to the present case, unless the election of a member to serve in Parliament be considered an "appointment." But this is clear, I think, that this sum of 400*l.* must necessarily be paid to members for one or other of four purposes:—

(1.) To keep up their dignity, and as a remuneration, in advance or otherwise, for the discharge of their duties.

(2.) To keep up their dignity, and enable them to discharge their duties.

(3.) To keep up their dignity, altogether irrespective of the discharge of their duties, or their ability to discharge them.

(4.) As a solatium for their membership, irrespective altogether of either their dignity or duties.

That is exhaustive. If the first, I should be inclined to hold that the sum paid was a salary. If any one of the other three, I should be inclined to hold it was "income" in the nature of a salary, but I think, as the judges thought in *Shine's Case* (2), it must be either the one or the other.

(1) [1892] 1 Q. B. 522, 531. (2) [1892] 1 Q. B. 522.

H. L. (I.) 1915 — HOLLINS-HEAD v. HAZLETON. — Lord Atkinson.

I observe that the Lord Chancellor of Ireland has likened this payment to an arbitrary and voluntary allowance, revocable at any moment at the will of the person paying it, such as is dealt with in the case of *In re Wicks.* (1) If that be so, then the pay of every officer in the Army and Navy and the pay of the bulk of the members of the Civil Service whose remuneration is not charged on the Consolidated Fund must equally be a voluntary allowance, and not either salary or income, since their pay is obtained in precisely the same way as these sums of 400*l.*, namely, by a vote passed in committee of supply followed by an Appropriation Act. Neither the Crown nor any of its officers could be sued by any naval or military officer or member of the Civil Service in any hostile proceeding in any Court of Law or Equity to recover the salaries voted to them: *Kinloch* v. *Secretary of State for India.* (2) Mandamus would not lie against the Treasury in respect of the salary voted: *Reg.* v. *Lords Commissioners of the Treasury* (3); *Reg.* v. *Inland Revenue Commissioners.* (4) A petition of right is merely an amicable litigation taken by the consent of the Crown against the Crown itself. In my opinion *In re Wicks* (1) has no more application to this case than, according to Lindley L.J., it had to the case of *In re Huggins* (5), or than, according to Lord Esher, it had to the case of *In re Ward.* (6)

The Lord Chancellor of Ireland also considered, apparently, that the case of *In re Hutton* (7) had some bearing upon this case. There the trustee asked to have allocated to him for the payment of the bankrupt's creditors a part of the income which the bankrupt might possibly make in the future by the exercise of his personal skill as a surgeon, but might never make. It depended upon the accident whether people would come to consult him, and upon whether he would choose to be consulted.

It was held that this man's capacity to earn money in the future was the only "property" he had, and that could not vest in the trustee, and therefore could not be income within s. 90.

It was contended in the present case that even if Boyd J. had jurisdiction to make the order of February 19, 1915, he exercised

(1) 17 Ch. D. 70.
(2) 7 App. Cas. 619.
(3) L. R. 7 Q. B. 387.
(4) 12 Q. B. D. 461.
(5) 21 Ch. D. 85.
(6) [1897] 1 Q. B. 266.
(7) 14 Q. B. D. 301.

his discretion in such a way that the order should be set aside. The Court of Appeal did not deal with this point. It was unnecessary for them to do so. It was not suggested there that this order should be merely varied, but that it should be set aside. It is quite obvious that a Court of Appeal should not set aside such an order merely because the judge of first instance, in the exercise of his discretion, left something less for the maintenance of the bankrupt than they themselves would be disposed to leave. It was contended, however, that the judgment of the learned judge showed that he proceeded upon a wrong principle and inflicted a kind of penalty on the bankrupt because he had refused to allow the claims of the petitioners to be liquidated by his friends or by his political party. I do not think that the judgment of the learned judge, when fairly considered, leads to any such conclusion. He took into consideration the facts that the bankrupt had maintained himself on 150*l.* per annum as evidence of what was sufficient for his maintenance, and also the fact that none of the bankrupt's relatives had claims upon him, and he formed the opinion that 200*l.* would be an adequate allowance. In fixing it at that figure he considered he was treating the bankrupt liberally, and then he used the words : " I think I am dealing liberally with him, especially as he admits that by the party who really caused his indebtedness he could have had his debts paid in full."

That does not, in my view, at all mean that he would have allowed the bankrupt to retain more of his so-called salary but for this refusal. It merely means, at the most, that he considers the adequate allowance which he had made was a liberal allowance for this and other reasons.

On the whole I am of opinion that the order appealed from was wrong and should be reversed ; that the order of Boyd J. of February 19, 1915, was right and should be restored, and the appeal be allowed with costs here and below.

Lord Shaw of Dunfermline. My Lords, on February 19 last Boyd J., sitting in the Bankruptcy Court in Ireland, made an order that Mr. Hazleton, member of Parliament for North Galway, should pay out of his salary of 400*l.* as such member a sum of 200*l.* per annum to the appellant as official assignee. The judgment

H. L. (I.) 1915

HOLLINSHEAD v. HAZLETON.

Lord Shaw of Dunfermline.

was to " be applied by the said official assignee in discharge of the debts due " by the bankrupt.

The award of bankruptcy was made on June 5, 1914, and after challenge was sustained.

Several matters—notably as to what were the debts, and why incurred—appear to have added zest to the discussion in the Courts below, but they do not elucidate the issue before this House.

On June 5, when Mr. Hazleton was declared bankrupt, he was not then a member of Parliament; he was an ex-member. In July, when he was elected a member of Parliament, he was a bankrupt.

Upon one point, accordingly, an explanation and statement may not be out of place. How comes it that there is a question as to the allocation of a portion of salary of a bankrupt member of Parliament? Are not bankrupts prohibited from sitting in Parliament? Upon this question there is a cleavage between British and Irish law and practice. It arises from the phraseology employed in the Bankruptcy Acts of the three kingdoms. The cleavage may have been accidental, but it is unquestionably deep.

The law of England stands thus: By the Act of 1883 (46 & 47 Vict. c. 52), ss. 32 and 33, it is provided that " where a debtor is adjudged bankrupt " he shall be disqualified for " being elected to or sitting or voting in the House of Commons." This applies, it will be observed, to " a debtor." The disqualification is removed on annulment of bankruptcy or the discharge of the bankrupt with a certificate that his bankruptcy was caused by misfortune and without his misconduct. If not so removed within six months the Court certifies this to Mr. Speaker, and the seat is vacated. By the Bankruptcy Act of 1890 (53 & 54 Vict. c. 71), s. 9, the disqualification is not to exceed a period of five years from the date of discharge.

The law of Scotland is substantially the same as that of England. By the Bankruptcy Frauds and Disabilities (Scotland) Act of 1884 (47 & 48 Vict. c. 16), ss. 5 and 6, the disqualification of the English Act of the previous year is adopted for Scotland; that is to say, " where a debtor is adjudged bankrupt " includes the case of " a person whose estate has been sequestrated or with respect to whom a decree of cessio bonorum has been pronounced."

The law of Ireland stands in this way. While the Scotch was put by Parliament on the same footing as the English law of bankruptcy, and the disqualification as to being elected or sitting in Parliament was thus assimilated, no such legislative step took place in regard to Ireland. The Irish position in this particular accordingly rests upon the code contained in the Bankruptcy (Ireland) Amendment Act, 1872 (35 & 36 Vict. c. 58). Sect. 41 thereof provides that "if a person, being a member of the Commons House of Parliament, is adjudged bankrupt, he shall be and remain, during one year from the date of the order of adjudication, incapable of sitting and voting in that House, unless within that time either the order is annulled, or the creditors who prove debts under the bankruptcy are fully paid or satisfied."

Herein lies the difference between the Irish and the British case. In the latter the disqualification applies to "a debtor"—a comprehensive and general term; the former applies to "a person being a member of the Commons House of Parliament," with the result that if a person was adjudged a bankrupt, not while he was, but while he was not, a member of Parliament, then the Irish Bankruptcy Act cannot apply to him and there is no disqualification. I can see at least room for an argument to the opposite effect, but no such argument was offered and practice seems to be against it. Furthermore, it is more than doubtful whether the competency of a member to be elected for or sit in the House of Commons could in any view be determined by the ordinary judiciary of the country, the question being one for that House under separate procedure. The case of the respondent is the case of a person who had been adjudged a bankrupt before his election.

The result accordingly is that English and Scotch bankrupts in that position may not be elected to, nor sit in, Parliament; Irish bankrupts may. Mr. Healy, in an eloquent and humorous aside, called this "another injustice to Ireland." But, my Lords, if it be an injustice at all, it is not an injustice to Ireland alone. For the Irish bankrupt would not be disqualified from election to or a seat in Parliament for any constituency in the United Kingdom, while in the case of the English or Scotch bankrupt the disqualification in all its scope would apply to him; he could not be elected to, or sit in, an Irish seat. I have referred to these matters, my

H. L. (I.) 1915

HOLLINS-HEAD v. HAZLETON.

Lord Shaw of Dunfermline.

Lords, not alone because of their public interest, but because they have a bearing on a question of public policy which was much canvassed in argument and in the judgments of the Courts below. To that question I shall immediately advert.

But before doing so, I refer to the argument submitted to the effect that the payment made to Mr. Hazleton in his capacity as a member of Parliament is not of the nature of salary, and, as I understood it, is not even of the nature of income. It is admitted that, apart from the considerations pleaded as to public policy, if it be salary or income in the ordinary sense, the ordinary rule of bankruptcy law, giving rights to the creditors therein, would apply.

It is notable that both in its origin and its annual distribution by Parliament the payment was treated as salary eo nomine.

On August 10, 1911, the House of Commons passed the following motion: "That in the opinion of this House provision should be made for the payment of a salary at the rate of 400*l.* a year to every member of this House, excluding any member who is for the time being in receipt of a salary as an officer of this House, or as a Minister, or as an officer of His Majesty's Household."

By the Appropriation Act of the same year a sum of 252,000*l.* was granted—Sched. B, Part 7, headed "Civil Services, Class II." —"to defray the charges of the several Civil Services herein particularly mentioned." And then the language of this item is thus given, namely, "for the salaries of members of the House of Commons." This language is repeated in subsequent years.

I see nothing to induce me to think that these payments are anything else than what Parliament, which granted them, has called them.

But the matter does not stop there. It is an admitted fact that income tax is paid and is payable in respect of this salary. It was to this state of matters that Parliament addressed itself by s. 3 of the Finance Act, 1913, which provided that deductions may be allowed in respect of expenses "where the Treasury are satisfied with respect to any class of persons in receipt of any salary, fees, or emoluments." And it is admitted that in respect of these expenses a deduction of 100*l.* is made from the salary of 400*l.* to members of Parliament.

I do not think it possible to treat the payments, in these

circumstances, as other than salary, and salary liable to income tax as income.

To this state of matters the provisions of the Irish Bankruptcy Statutes must apply. These provisions are two in number. By the 51st section of the Act of 1872, it is provided that when a bankrupt is in receipt of a salary or income other than is mentioned in s. 319 of the Irish Bankrupt and Insolvent Act of 1857 "the Court may from time to time make such order as it thinks just for the payment of such salary or income, or of any part thereof, to the official assignee."

The Act of 1857, in the section just referred to, provides that the Court may order such portion of the "pay, half-pay, salary, emolument, or pension of any bankrupt" as, on communication from the Court, various departments of State may consent to. It appears to be agreed that this section, which applied in terms to the War Office, Admiralty, the East India Company, or a Government department "to which such bankrupt may belong," did not cover the case of the respondent. These two statutes between them are completely exhaustive. And I see no justification for the view of the learned Master of the Rolls that the one statute was exhaustive of all instances of public salaries, and the other and later had only to do with private incomes.

Accordingly it would not appear to be doubtful that since this case is "other than" one covered by the Act of 1857 the Act of 1872 must embrace it. I am humbly of opinion that this is so, and that it was within the competence of Boyd J., acting under the provisions of the later Act, to pronounce the order of February 19, that the bankrupt do pay out of his salary or income 200*l.* yearly in four instalments to the official assignee, to be applied in discharge of the bankrupt's debts.

My Lords, I think that the various statutes cited are conclusive of the point, and that reinforcement by authority is accordingly out of place. But if such reinforcement had been required there seems little doubt that the decided cases, and notably the important judgment of Lindley L.J. in *In re Huggins* (1), would lead to the same result, namely, that the payments to Mr. Hazleton are payments of salary or income to which the Bankruptcy Acts apply.

(1) 21 Ch. D. 85.

H. L. (I.) 1915 HOLLINS-HEAD v. HAZLETON. Lord Shaw of Dunfermline.

Only a few words are required in dealing with the suggestion made that the payments made to Mr. Hazleton cannot be considered salary or income because it is open to Parliament to alter the law and refuse in future years the vote of salaries to members of the House of Commons. This, my Lords, seems to have no bearing on the question ; many of the salaries or incomes earned throughout the country are enjoyed on a tenure equally or even more precarious, with no future rights except, it may be, to a week's or a month's notice before dismissal, but the payments as they accrue are nevertheless and unquestionably payments of salary or income.

Another argument is to a converse effect, namely, that it would be to lower a position of such dignity and of great independence to permit of the distribution of any part of the payments made towards the liquidation of the member's debts. My Lords, I have much difficulty in understanding what the argument means, unless, indeed, we are supposed to have left the regions of fair dealing altogether. I am, moreover, in some measure acquainted with a system of jurisprudence in which such an allowance is made to the creditors of persons who, being overtaken by bankruptcy, have continued to hold positions of the highest dignity and responsibility. Clergymen of the Established Church, town clerks, and professors in universities—all of them, to speak generally, holding office ad vitam aut culpam—have been liable to the action of their creditors in ingathering their salaries, the bankrupt being secured by the Court in a beneficium competentiae. This result, just in itself and just to all parties, is exactly analogous to that achieved by the learned Boyd J. in the order which he made in this case.

As to the amount of the allowance of 200*l.*, I do not detain your Lordships. The cases would, and in my opinion ought to be, of the rarest and most special and cogent, when any Court of Appeal would interfere with the estimate and award made by the judge sitting in bankruptcy. In all ordinary cases—of which this seems to be one—the opinion of that judge should be final.

The only question remaining to be dealt with is that of public policy. This is apparently at the foundation of the judgments of the learned Lord Chancellor and Palles C.B. The learned Master of the Rolls does not appear to share their views, and sets them aside,

basing his own opinion upon the Acts of Parliament. These I have already analysed.

It cannot be suggested that this House, sitting as a Court of law, should presume to import into the construction of an Act of Parliament any views or conjectures as to the grant of these salaries by the Legislature. That—the legislative stage—is concluded. The salaries are there; and they have been instituted without any language of statute to suggest that the salaries so set up should be subject to any differential treatment by law.

The argument accordingly is that there is some ground of public policy which should induce the judiciary to prevent the ordinary rule from coming into operation—the rule which distributes this income among creditors—a due reserve being made for the bankrupt at the sight of the Court. I cannot see that there is any such ground of public policy. There is no injury to the general body of His Majesty's lieges which compels such an abrogation of creditor's rights, or confers a discriminative privilege upon a member of Parliament. Such a privilege—if it be privilege to enjoy for oneself something which if one were not a member would go to one's creditors by the ordinary law of the land—does not seem to me to find any warrant in public policy.

The view of the Legislature on such a claim is well indicated so late as in the Bankruptcy Act of last year. Sect. 128 of that Act prescribes: "If a person having privilege of Parliament commits an act of bankruptcy, he may be dealt with under this Act in like manner as if he had not such privilege." And I cannot see anything of public policy which should induce the judiciary to come to any different view.

My Lords, I see no reason of public policy—arising from the dignity or responsibility of Parliament or any one of its members—for raising the latter into an elevation beyond the reach of his creditors.

As the law stands upon the statutes, and until these are altered by Parliament, the Irish bankrupt may be elected to the House of Commons, while a British bankrupt is under a disability in this particular—a disability which he shares with traitors, aliens, minors, and madmen. I see no ground of public policy which would, this being the case, give to those bankrupts who are so admitted

H. L. (I.) 1915

HOLLINS-HEAD v. HAZLETON.

Lord Shaw of Dunfermline.

to Parliament a privilege not accorded to any other bankrupts in the country, thus making them not only privileged over their fellow members, but privileged over their fellow citizens.

I do not, on public policy, see any reason for thus elevating the position, nor, upon law, do I, as I have stated, see any ground for lowering the position of salaries of members of the House of Commons by the derogatory treatment of such income as merely an alimentary or eleemosynary dole.

I concur in the judgment proposed.

LORD PARKER OF WADDINGTON. (1) My Lords, I agree.

The question your Lordships have to decide depends primarily on the true construction of s. 319 of the Irish Bankrupt and Insolvent Act, 1857, and s. 51 of the Bankruptcy (Ireland) Amendment Act, 1872. These sections have to be read together as part of one Act. (See s. 1 of the Act of 1872.) Sect. 319 deals with some but not all of the salaries or periodic payments in the nature of salary, which by the common law could not, on grounds of public policy, be assigned or taken in execution either at law or in equity. It enables the salaries or periodic payments with which it deals to be made available to some extent for the creditors of a bankrupt notwithstanding the policy of the common law. The 51st section of the later Act deals with all salaries or income not falling within the provisions of s. 319 of the earlier Act. It enables the salaries or income with which it deals to be made similarly available. The only difference between the two sections is that the extent to which salaries or periodic payments falling within s. 319 can be made available depends on the discretion of the judge in bankruptcy, to be exercised with the consent of the public official therein referred to, whereas the extent to which salaries or income falling within s. 51 can be made available depends on the discretion of the judge in bankruptcy alone. If the sections be read together it is reasonably clear that the 51st section embraces all salaries which were not assignable or capable of being taken in execution by common law other than those specified in s. 319. It was so decided in *In re Huggins* (2) in reference to the corresponding provisions of the English Bankruptcy Act of 1869.

(1) Read by Lord Parmoor. (2) 21 Ch. D. 85.

In construing an Act which, on the face of it, is intended to modify public policy for the benefit of the creditors of a bankrupt it would be wrong for any Court of law to limit the plain meaning of the words used by appealing to the public policy intended to be modified. The only public policy which such a Court can consider is the public policy embodied in and appearing on the face of the Act itself.

My Lords, in the present case the judge in bankruptcy, on February 19, 1915, made an order under the 51st section of the Act of 1872 directing the bankrupt to pay to the official assignee in his bankruptcy for the benefit of his creditors the sum of 200*l.* per annum out of his parliamentary salary or income of 400*l.* per annum. If the parliamentary salary or income referred to be salary or income within the 51st section, the judge in bankruptcy had full discretion to make the order he did, and there is certainly nothing to justify your Lordships in interfering with such discretion. If the order was wrong it must be on the ground either (1.) that the parliamentary salary or income referred to was within s. 319 of the earlier and not within s. 51 of the later Act, or (2.) that it was not within either section.

It was not contended before the Court of Appeal, nor is it contended before your Lordships, that the parliamentary salary or income in question is within s. 319 of the earlier Act. The whole argument before the Court of Appeal and before your Lordships was that it was not within either section, and the Court of Appeal discharged the order made by the judge in bankruptcy upon this ground. In order to see whether the Court of Appeal was right in so doing it is necessary to consider the origin and nature of the parliamentary salary or income with which the judge in bankruptcy had to deal.

My Lords, it appears that on August 10, 1911, the House of Commons passed a resolution that "In the opinion of this House provision should be made for the payment of a salary at the rate of 400*l.* a year to every member of this House, excluding any member who is for the time being in receipt of a salary as an officer of the House, or as a Minister, or as an officer of His Majesty's Household."

Ever since this resolution was passed, members of Parliament, as such, have regularly received 400*l.* per annum by equal quarterly

H. L. (I.) 1915 HOLLINS-HEAD v. HAZLETON. Lord Parker of Waddington.

instalments, the money required being included in the Estimates, voted in the usual manner, and subsequently appropriated for the purpose by the annual Appropriation Act. The Appropriation Act of 1911 contains an express reference to the "salaries" of members of the House of Commons. In subsequent Appropriation Acts these salaries are included in the general salaries and expenses of the House, but this change of form does not connote any change in the nature of the payment. The payment is made to and received by every member virtute officii. It does not vary with his pecuniary needs or with the expenses he must incur in fulfilling his duties or with the assiduity with which those duties are fulfilled. Indeed, it continues to be payable to him for periods during which he may be disqualified from sitting and voting, and can have no duties to perform. (See Bankruptcy Act, 1883, s. 33, sub-s. 1.) It may be precarious in the sense that the House of Commons may at any time see fit to rescind this resolution of August 10, 1911, or to refuse to vote the necessary funds, but there is the same expectation of continuity of payment as exists in the case of all officials whose salaries are not charged on the Consolidated Fund. In other respects it bears all the marks of an official salary. Moreover, it is admittedly income, and as such (after allowing the deductions for expenses provided by the Finance Act, 1913) is subject to income tax. Under these circumstances I confess I am unable to see any reason why it should not be held to be salary or income within the 51st section of the Act of 1872.

My Lords, in holding the contrary I think the Court of Appeal were, to some extent at any rate, influenced by a consideration of the objects which the House of Commons might be supposed to have had in view in passing the resolution of August 10, 1911.

The Lord Chancellor, for example, was of opinion that the salary must be looked on as payment of money, first, to indemnify the member in respect of general loss of other means of subsistence caused by his having to attend to his public duties; secondly, to indemnify him against the actual expenses which he may have had to incur; and, thirdly, to ensure by means of such indemnity that no member of the House might be prevented from discharging the great public duties entrusted to him by the vote of his constituency. He seems to have thought that on this footing it would

be against public policy to make any part of the salary of a member available for the payment of his creditors.

Again, the Lord Chief Baron appears to have been of opinion that the salary was granted to enable a member to perform his duties and support his office with the degree of dignity due to it, and that therefore it would be against the principles of the common law to make the salary available for his creditors in the bankruptcy.

In my opinion Courts of law have no business in such a case to speculate on the objects which the House of Commons may have had in view. It is not for them to say that what is voted and paid as, and bears all the distinguishing marks of, a salary is not a salary, because, if it were, some presumed intention of the House of Commons might be frustrated by an application of the general law.

It may well be that at common law the salary in question would be inalienable, but that is no reason for refusing to apply the provisions of the law of bankruptcy under which other salaries, inalienable at common law, can be made available for creditors.

Again, it may well be that one of the objects the House of Commons had in view in passing the resolution of August 10, 1911, was to enhance the dignity and to increase the efficiency of its members, but even so I am not sure that public policy has not on this occasion justified its reputation as an unruly horse, for while, on the one hand, the public is undoubtedly interested in every man paying his lawful debts, it is, on the other hand, by no means clear that either the dignity or efficiency of a member of Parliament would be enhanced by his being placed in a better position to defeat his creditors than the rest of His Majesty's subjects.

In my opinion the appeal succeeds.

LORD SUMNER. (1) My Lords, the respondent is an undischarged bankrupt, who sits in the House of Commons as member for North Galway, and in that capacity is paid 400*l.* a year out of funds provided by Parliament. Previous to his election he had been adjudicated a bankrupt in Ireland upon his own petition. If he had been adjudicated under the bankruptcy legislation applicable in England, Scotland, and Wales he would have been ineligible for election.

(1) Read by Lord Atkinson.

H. L. (I.) 1915 HOLLINS-HEAD v. HAZLETON. Lord Sumner.

Much has been said upon the difference between the Irish Bankruptcy Acts and those which govern other parts of the United Kingdom, and Mr. Healy warmly disputed and deplored it as an injustice to Ireland. Be this as it may, the respondent receives this sum as having been validly elected to Parliament, and I think your Lordships can but deal with that fact as you find it; otherwise the order of Boyd J., which the appellant seeks to restore, would have neither basis nor operation.

The chief question is whether this payment is either "salary" or "income," that is "salary" or "income" within the meaning of s. 51 of the Bankruptcy (Ireland) Amendment Act, 1872; but, as that Act neither defines nor qualifies these terms, I take it that the best, if not the only, way of deciding whether the payment comes within the meaning of the section is to ascertain whether it comes within its words.

The money is paid quarterly. It is not, I gather, forthcoming immediately upon election. The payee may be a member and be entitled to sit and actually sitting for some time before he is put in funds. The payments are the same for all members, and all members (except those in receipt of ministerial salaries) are entitled to them. The fund out of which they are made is appropriated by statute annually to the service of the Crown, and the office which actually disburses them is that which pays so many public salaries. It is that of the Paymaster-General. They are chargeable with income tax, a fixed sum of 100*l.* per annum being allowed free of tax in all cases upon the supposition that it represents the expense of performing parliamentary duties. The rest is taxed as income belonging to the member and applicable to his own purposes.

My Lords, judging by the character of these payments, I am, with all respect, unable to join in the views taken in the Court of Appeal in Ireland, that they are either an indemnity against the cost of being in Parliament, or a subvention in aid of the member's private means in case they are insufficient to support that dignity, or a compensation for the public work he may do, or only a casual and precarious bounty not to be reckoned upon until it is encashed.

The question before your Lordships is one of interpretation of the relevant statutes in the light of the circumstances and the practice

proved. As the sum is the same for all, though the expenses, the means, the sacrifices, the labours, and the attendances of the members differ, I think it is in its nature a salary, and a salary none the less that, like all State salaries not specifically charged on the Consolidated Fund or otherwise provided for by statute, it will not be paid unless Parliament annually appropriates public money for the purpose.

The Legislature has in fact chosen the word " salary " to describe these payments. If I may say so, it has done so with equal deliberation and precision. The term is used in the Appropriation Act, 1911 (1 & 2 Geo. 5, c. 15), Sched. B, Part 7, Class II., item No. 1A, and the Finance Act, 1913, s. 3, is also applicable. I think that the modification introduced by the Appropriation Act, 1912 (2 & 3 Geo. 5, c. 7), Sched. B, Part 6, Class II., item No. 2, makes no difference in this regard.

If, then, the payments which the respondent receives are salary or income within s. 51 of the Act of 1872, an order to pay part of them to the appellant was within the jurisdiction of Boyd J. The contrary is argued upon the grounds either that (1.) they fall within 20 & 21 Vict. c. 60, s. 319, in which case the consent of the head of the respondent's department would have been required, or that (2.) s. 51 of the Act of 1872 is placed in such antithesis to s. 319 of the Act of 1857 that it must be read as referring only to private salaries or incomes, in contradistinction to those derived from the State, or that (3.) there is such a rule of public policy against the alienation of salaries like this as requires the words to be read otherwise than in their apparent sense.

As s. 319 proceeds by enumeration of departments, and necessarily does not name this salary, and as the respondent is not a subordinate in any department, the case does not fall within s. 319. The two sections read together clearly mean that all salaries or incomes not brought in by the first shall be comprehensively brought in by the second. I am not satisfied that this salary has any analogy in fact to those payments, made for the purpose of enabling a certain office of State to be maintained or of retaining the future services of officers, which have been the subject of the decisions cited; but, however this may be, the words of the statute, being clear, import that the Legislature considered that the alienation of part of this salary

H. L. (I.) 1915 HOLLINS-HEAD v. HAZLETON. Lord Sumner.

under an order in bankruptcy was consistent with public policy, a view which is supported by the explicit application of similar provisions in other Bankruptcy Acts to various payments, which probably would be inalienable at common law. I think, therefore, that the plain words of s. 51 must be enforced, and that the order of Boyd J. was rightly made. The quantum to be paid was in his discretion, and, as I read his judgment, it proceeded on no erroneous principle of law. I think that the appeal should be allowed.

Order of the Court of Appeal in Ireland reversed and order of Boyd J. restored. The respondent to pay the costs in the Courts below and also the costs of the appeal to this House.

Lords' Journals, December 10, 1915.

Solicitors for appellant: *Munton, Morris, King, Gavan Duffy & Co., for Wm. V. Seddall, Dublin.*

Solicitor for respondent: *Herbert Z. Deane, for J. L. Scallan & Co., Dublin.*

[HOUSE OF LORDS.]

H. L. (E.)* 1916 *Jan.* 31.

OWNERS OF S.S. SERBINO . . . . . APPELLANTS;

AND

PROCTOR AND ANOTHER (BY THEIR NEXT FRIEND) . . . . . RESPONDENTS.

Employer and Workman—Compensation—Accident arising out of Employment—Seaman—Unexplained Drowning—Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *s.* 1, *sub-s.* 1.

A seaman was chief engineer on a steamship and was responsible for the working of all the machinery in the ship. He was troubled because there was something wrong with the propeller. On the evening before the ship arrived in port he told the steward to call him before his usual hour and bring him tea. This was done; he got up about 5.40, dressed in his working clothes, and was last

---

* *Present:* LORD BUCKMASTER L.C., LORD ATKINSON, LORD PARKER OF WADDINGTON, LORD SUMNER, and LORD PARMOOR.

H. L. (E.) 1916

S.S. SERBINO (OWNERS) v. PROCTOR.

seen going to the stern of the ship. His watch would not have begun till 8 o'clock :—

Held, that there was evidence to support the inference of the county court judge that he went to the stern to look at the propeller and his finding that his death was caused by accident arising out of and in the course of his employment within the meaning of the Workmen's Compensation Act, 1906.

Decision of the Court of Appeal [1915] 3 K. B. 344 affirmed.

APPEAL from an order of the Court of Appeal affirming an award under the Workmen's Compensation Act, 1906, of the county court judge of Yorkshire. (1)

The respondents, the widow and infant daughter of David Johnson Proctor, claimed compensation as dependants of the deceased, who was drowned in the North Sea on June 16, 1913.

The widow was so shocked at the news of her husband's death that her mind became affected, and this application was made by her mother as her next friend.

Proctor was employed as chief engineer on board the appellants' steamship *Serbino*, and he was responsible for the working of all the machinery on the ship. The *Serbino* was a new ship. In May, 1913, she left Hull for Petrograd—that being her second voyage—where she arrived on June 1, 1913. While the ship was lying in dock at Petrograd Proctor observed that two of the propeller tips were bent, and he went into a boat to examine the damage. It was, however, found impracticable to put the matter right then, and the ship started on her homeward voyage with the two blades bent. In the course of this voyage Proctor frequently spoke about the trouble with the propeller to the third engineer, and was worrying himself about it and also about certain defects in the working of the engine. Shortly after passing Copenhagen the revolutions of the screw increased and the engines raced. Proctor expressed the opinion that this was due to the tips of the propeller having been broken off, but in this view he was mistaken. Eventually he gave orders to pump out the forepeak tank and fill the after tank, whereby the ship got more down by the stern so that the propeller was deeper in the water, and by this means the racing was overcome. The ship was

(1) [1915] 3 K. B. 344.

H. L. (E.)
1916
S.S. SERBINO (OWNERS) v. PROCTOR.

due in Hull on June 16. On the afternoon of June 15 he asked the steward to call him in the morning at the same time as he called the second engineer—namely, about 5.40—and bring him tea. This was done, and Proctor drank his tea and immediately got up. About ten minutes later he was seen by the steward going round the wheel-house in the stern. He was dressed in his ordinary working clothes. He was not seen again. He was first missed about 8 o'clock. He usually got up about a quarter to 8. His watch would have begun at 8 o'clock. During the voyage he appeared to be in good health and in fairly good spirits, though somewhat preoccupied about the defects in the machinery of the ship. He was described by the second engineer as a quiet, deep-thinking man. He was on affectionate terms with his wife and family.

The county court judge found that the deceased did not commit suicide and that his death was caused by an accident arising out of and in the course of his employment, and he inferred from the facts that the deceased fell overboard while trying to look at the propeller from the stern of the ship. He accordingly made an award in favour of the respondents. This award was affirmed by the Court of Appeal (Lord Cozens-Hardy M.R., Pickford and Warrington L.JJ.).

Alex. Neilson and *W. H. Owen*, for the appellants. There is no evidence to show how this occurrence happened, nor, assuming it to be an accident, is there any evidence that it arose out of the employment. The unexplained disappearance of a seaman from a ship at sea does not of itself bring the man within the Act: *Marshall* v. *Owners of S.S. Wild Rose.* (1) *Kerr or Lendrum* v. *Ayr Steam Shipping Co.* (2) is distinguishable, because in that case the man was under orders to get tea for the crew. Assuming that the theory of the county court judge is correct, the seaman was taking an added risk upon himself; he should have got a man to hold him by a rope. [The following cases were also referred to:—*Smith* v. *Lancashire and Yorkshire Ry. Co.* (3); *Plumb* v. *Cobden Flour Mills Co.* (4); *Barnes* v. *Nunnery Colliery Co.* (5)]

(1) [1910] A. C. 486, 491.
(2) [1915] A. C. 217.
(3) [1899] 1 Q. B. 141.
(4) [1914] A. C. 62.
(5) [1912] A. C. 44.

Gordon Hewart, K.C., and *Gilbert Stone*, for the respondents, were not called upon.

LORD BUCKMASTER L.C. My Lords, this case does not involve the construction of obscure or doubtful phrases in an Act of Parliament; it depends entirely upon a question of evidence, and that question is whether or no there was material before the learned county court judge upon which he as a reasonable man could come to the conclusion that the deceased met his death by an accident in the course of and arising out of his employment.

My Lords, something has been said in the course of the argument as to the character of the evidence upon which the learned county court judge's judgment was based. It is urged—and it is true—that the evidence is evidence of circumstance; but evidence of circumstance may be, and in many instances is, more trustworthy than other evidence, and frequently it is more expressive. But in either case, whether it be so regarded or not, no advantage is gained in attempting to classify and catalogue different classes of evidence. Provided that the matter has been properly admitted before the learned county court judge at the trial, the only question is, was there evidence before him which would support the conclusion which he reached?

Now in this case there are certain facts which I think can be shortly stated which will show why it is that I think the learned county court judge's judgment was perfectly right. The deceased was chief engineer on board of the steamship *Serbino*, which was making its homeward voyage from Petrograd to Hull at the time when he met his death. When the boat had been in dock before starting it was found that the propeller was bent, and in the course of the voyage from time to time difficulties arose which caused him considerable uneasiness about its condition. There is no doubt that this was a matter about which he was very greatly concerned, and indeed on June 14, two days before his death, he had a conversation with another officer on board the vessel about the cause of the difficulties the ship was encountering and expressed his firm conviction that the tip of the propeller was broken; he referred to it two or three times on that day. Now on June 15, the following day, after his watch, he went downstairs and gave

H. L. (E.) 1916

S.S. SERBINO (OWNERS) v. PROCTOR.

Lord Buckmaster L.C.

directions to the steward that he should be called early the following morning. At 12.50 on the following morning he was still up and had gone to the engine-room once more for the purpose of seeing if all was right with an engine about which again there had been some difficulty, but a difficulty entirely unassociated with that in connection with the propeller. He told the man in charge that if anything happened in the night he was to be called. Then he went to bed, I suppose between 12.50 and 1 o'clock. The next thing we know is that he was called at 5.40 A.M. He got up at once, he was seen by the steward to go behind the wheel-house, and he was never seen again.

My Lords, so far as the facts of the voyage are connected with this man's death, I believe those are the whole of the material circumstances; but there is one thing more that should be stated, and that is this. It is plain from the letters which are set out in the appendix to this case that the deceased was on terms of close and intimate affection with his wife, that his domestic relations were particularly happy, and that he was looking forward to coming home. In these circumstances, what is the inference that is to be drawn as to the way in which he met his death? There are three hypotheses, and I can see no more. One is that he met his death by foul play, another that he met his death by suicide, and the third is that he met it by accident. The question of foul play may be wholly disregarded, and so also to my mind, my Lords, may the question of suicide. It is not merely that the evidence does not support the view that this man took his own life, but I think it affords convincing proof that he did nothing whatever of the kind. And I desire that this matter should be emphasized, because the infant plaintiff is bound to start life under the dark shadow of the calamity that has already overtaken her mother, and I think it is of the utmost importance that nothing should be said or suggested that would darken that shadow by throwing any slight upon her father's memory. Suicide therefore being out of the question, the only third alternative is that of accident.

Now it is quite true that accident by itself would not be sufficient to support the applicant's case. The accident must be an accident in the course of and arising out of the employment of the deceased. The deceased was the chief engineer on board this vessel, and

his employment as chief engineer necessarily involved his control of the whole of the machinery of the ship. Further, there was in my view arising out of that control the duty of taking all necessary steps from time to time to ascertain the cause of any defects in the running of the machinery. He had formed a strong opinion that the propeller was wrong, that the defect which had happened when the ship was in port had been increased while it was at sea, with the result that the tips of the blades had been broken. It is urged by the appellants that if he wanted to ascertain whether that was true or not the proper place for doing so would be in the engine-room ; but the facts in this case prove conclusively that the engine-room would not have given him the information that he sought, because this man, who was a skilled engineer, had been in the engine-room and had failed to discover that in fact the tips of the propeller had not been broken as he thought they had. There was only one other way by which that investigation could take place, and that was by attempting to see the blades of the propeller in the water. To my mind it is not important that in fact his attempt to see them might have been accompanied by risk, or that it might have been difficult for him to obtain exact information from such inspection. It was clearly in the course of his employment to examine what was the matter, and I cannot help thinking that there was nothing so unusual in the method he may be assumed to have taken as to take it outside the sphere of his work.

My Lords, from the facts as I have stated them the learned county court judge came to the conclusion that the true inference to be drawn was that the deceased got up early in the morning of June 16 with the purpose of going to see the working of the propeller at the stern of the vessel. With that inference I am in entire agreement. That his getting up ôn June 16 was not for any casual whim or fancy is I think sufficiently shown by what has occurred. It was not his habit to get up early for the purpose of enjoying the morning on deck. He got up on this morning with an object. It was suggested that that object might have been to take away his life. As I have already said, that impulse cannot be attributed to him. Then what was the impulse that made him purposely get up two hours before his usual time ? The fair inference is that it was in order that he might have a further opportunity of investigating

H. L. (E.) 1916

S.S. SERBINO (OWNERS) v. PROCTOR.

Lord Buckmaster L.C.

this difficulty which had no doubt caused him some anxiety on the homeward voyage. He was seen going behind the wheel-house towards the stern in the direction of the spot where he would be able to ascertain by investigation what had occurred, and I think there is evidence to support the inference that the learned county court judge drew, that in the course of making that investigation and inspection he met his death.

It is then urged on behalf of the appellants that if he did he met his end because he was taking a risk so unusual and so grave that even upon the hypothesis that has been assumed, that made his act one that was outside the sphere of his employment altogether. My Lords, I am quite unable to accept that view. I entirely agree with what the learned county court judge says when he states that it is very difficult indeed to place a limit upon the risks that a man may fairly run in the course of his employment for the purpose of discharging his master's work. If this man did go for the purpose of inspecting the propeller he did it in the course of his employment and for his master's benefit, and I am wholly unable to see that there is any evidence to satisfy your Lordships that in performing that act he went outside the duty that he was reasonably bound to discharge as chief engineer of the ship.

My Lords, for these reasons I think the appeal should be dismissed.

LORD ATKINSON. My Lords, I concur. I have nothing to add.

LORD PARKER OF WADDINGTON. My Lords, I agree.

LORD SUMNER. My Lords, I agree.

LORD PARMOOR. My Lords, I concur.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, January 31, 1916.

Solicitors for appellants: *Botterell & Roche, for J. & T. W. Hearfield & Lambert, Hull.*

Solicitors for respondents: *C. J. Smith & Hudson, for Locking, Holdich & Locking, Hull.*

[HOUSE OF LORDS.]

J. & P. HUTCHISON . . . . . APPELLANTS;

AND

M'KINNON . . . . . RESPONDENT.

H. L. (Sc.)*
1916
Feb. 1.

Employer and Workman—Compensation—Seaman—Accident arising out of Employment—Drinking Poison by Mistake for Water—Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *s.* 1, *sub-s.* 1.

A seaman on board a ship, which was in harbour in a hot climate, by mistake drank from a tin which he thought contained water a solution of soda and was badly burnt. The solution had been put into the tin by its owner, the boatswain, to clean it. It was the practice of the crew to carry the water obtained from the ship's pump in tins to a cool place and partake of it as required. This practice was sanctioned by the officers, but was not done by their orders. It was quite common for one man to drink water from another man's tin. The seaman found the tin in question in a place where there was sometimes a draught of air through the hawse holes.

Upon a claim for compensation under the Workmen's Compensation Act the sheriff-substitute found that the accident arose out of and in the course of the man's employment:—

Held, that the risk of drinking drugged water out of a tin belonging to another member of the crew was not shown to be reasonably incidental to the seaman's employment, and that there was no evidence to support the finding of the sheriff-substitute.

Observations by Lord Atkinson on the duty of the arbitrator to distinguish clearly between rulings on fact and rulings on law.

Decision of the Second Division of the Court of Session in Scotland 1915, S. C. 867, reversed.

APPEAL from an interlocutor of the Second Division of the Court of Session in Scotland upon a case stated by the sheriff-substitute of Lanarkshire upon a claim for compensation under the Workmen's Compensation Act, 1906. (1)

The facts found by the case were as follows:—

The respondent was a seaman on the steamship *Fastnet*, belonging to the appellants.

On August 16, 1913, while the vessel was in the harbour of Spezzia, Italy, the respondent, by mistake, drank from a tin which

* *Present:* LORD BUCKMASTER L.C., LORD ATKINSON, LORD SHAW OF DUNFERMLINE, LORD PARKER OF WADDINGTON, and LORD SUMNER.

(1) 1915 S. C. 867.

H. L. (Sc.) 1916 J. & P. HUTCHISON v. M'KINNON.

he thought contained drinking water a solution of caustic soda which the boatswain had put into the tin for the purpose of cleaning it. The tin was the property of the boatswain and the donkeyman, who messed together. They used it for brewing tea.

As a result the respondent was badly burnt in the mouth and throat, and sustained severe and permanent injuries which completely incapacitated him for work.

Drinking water could at any time be obtained by the crew from the pump, which was situated amidships or somewhat abaft thereof; but, as the water was warm to the taste, it was the practice of the crew to take it in tins or cans to a cool place, and leave it to cool and partake of it as required. This practice was sanctioned by the officers; but it was never done by their orders.

There was a good deal of give and take, so that it was quite common for one man to drink water which had been carried from the pump by some other man.

The respondent found the tin referred to on the deck immediately below the forecastle head, where there was sometimes a draught of air through the hawse holes, and, thinking it contained water which had been set there to cool, drank of it.

The respondent was discharged from the vessel on its return to Glasgow on September 9, 1913.

The respondent caused a claim for compensation under the Act to be made to the appellants on September 15, 1913, but he did not raise the present process under the Act until September 4, 1914. He explained the delay by the prolonged suffering and illness due to the accident. The appellants were now unable to trace many of the crew. The captain had died, and some evidence had probably been lost which it might have been most desirable to have.

The sheriff-substitute found upon these facts that the accident arose out of and in the course of the respondent's employment with the appellants, and awarded him compensation.

The question of law for the opinion of the Court was whether there was evidence upon which the arbitrator could competently so find.

The Second Division (Lord Guthrie, Lord Hunter, and the Lord Justice-Clerk) affirmed the award of the sheriff-substitute.

1915. Nov. 29. *Horne, K.C.* (of the Scottish Bar), and *Alex. Neilson*, for the appellants. This was not a risk to which the respondent was specially exposed by the nature of his employment, but was a risk common to mankind. This case, therefore, does not fall within the Act: *Craske* v. *Wigan*, per Cozens-Hardy M.R. (1), approved by Lord Dunedin in *Plumb* v. *Cobden Flour Mills Co.* (2); *Kitchenham* v. *Owners of S.S. Johannesburg*, per Fletcher Moulton L.J. (3), approved by Viscount Haldane in *Webber* v. *Wansborough Paper Co.* (4); *Warner* v. *Couchman* (5); *Rodger* v. *Paisley School Board.* (6) There was no sanction given by the employer to the man drinking out of other people's tins. In taking his chance of the tin containing clean water he was taking an added risk upon himself. Although the arbitrator's finding of fact will not be readily disturbed, the finding that the accident arose out of and in the course of the respondent's employment is not a finding of fact but a conclusion of law.

T. M. Healy, K.C. (of the Irish and also of the English Bar), and *T. Scanlan*, for the respondent. It is the right of every British sailor on board ship to have suitable drinking water provided: Merchant Shipping Act, 1894, s. 198; Merchant Shipping Act, 1906, s. 26. In a hot climate cold water for recuperation is a necessity for men working in a ship, and the practice of the crew to put the water to cool in order to make it drinkable had the sanction of the officers. There was here ample evidence to support the finding of the arbitrator. *Lee* v. *Stag Line* (7) and *Cokolon* v. *Ship Kentra (Owners)* (8) are analogous cases.

Horne, K.C., replied.

The House took time for consideration.

1916. Feb. 1. LORD BUCKMASTER L.C. My Lords, I cannot help regretting that the facts in this case have not been found in a more detailed and decisive form, but they must be accepted as they stand, and I am unable to hold that they justify the assumption upon which the judgment of the judges of the Second Division was

(1) [1909] 2 K. B. 635, 638.
(2) [1914] A. C. 62, 68.
(3) [1911] 1 K. B. 523, 527.
(4) [1915] A. C. 51, 54.
(5) [1912] A. C. 35, 37.
(6) 1912 S. C. 584.
(7) (1912) 5 B. W. C. C. 660.
(8) (1912) 5 B. W. C. C. 658.

H. L. (Sc.) 1916 J. & P. HUTCHISON v. M'KINNON. Lord Buckmaster L.C.

based. In the case stated by the sheriff-substitute nothing is mentioned as to the character of the tins in which the water was ordinarily cooled, nor as to their ownership, nor, again, as to the place where it was customary to deposit them. Lord Guthrie, however, came to the conclusion that the following facts were found by the arbitrator: (1.) That the can in question was standing in the usual place where cans were put to cool. (2.) That the seaman did not know that the can he drank from belonged to another man. (3.) That all the cans were either identical or similar in appearance. And if these assumptions were justified I should not differ from the conclusion at which he arrived.

I have accordingly made the most diligent examination to see if it is possible to extract these important and material findings from the facts as they are stated in the documents before this House, and I have been unable to find support for any of them. I cannot help having an uneasy feeling that, had attention been directed to these points, there might have been findings that would have placed the applicant in a more favourable position than that in which he now stands. It seems, however, to be impossible, after this lapse of time, with many of the witnesses dispersed and the circumstances far distant from the memory of those who could be obtained, to get a further restatement of the facts, and the case must be determined upon the findings as they appear in the award.

From these findings it merely appears that it was the practice of the crew, known to and sanctioned by the officers, to cool their drinking water, after drawing it from the pump, by placing it in cans in a cool part of the ship, and that the respondent drank from a can which was not his own, nor found either to resemble his own or to have been mistaken for it.

The can in question contained a solution of caustic soda, and in consequence the respondent was seriously injured. Apart from the practice and the sanction to which I have referred, the case would have been the same as that of one man using another's drinking vessel, and injury resulting from such a cause could not be said to arise out of the employment of the respondent as a seaman on board a vessel. In my opinion the addition of the bare facts found cannot alter this conclusion.

It may have been a reasonable course which the men took to

render the water more palatable, and equally reasonable for the officers to raise no objection to its being pursued; but this cannot enable a man to assume, at the risk of his employers, that a can which was not his own, and not shown to resemble those in general use, was containing water set out to cool in the ordinary way. For these reasons I think the judgment appealed from should be reversed.

LORD ATKINSON. My Lords, this is an appeal from an interlocutor dated June 5, 1915, of the Second Division of the Court of Session on appeal by way of case stated by the sheriff-substitute of Lanarkshire as an arbitrator under the Workmen's Compensation Act of 1906.

Certain facts are set out on the face of the case stated, and upon these facts so stated the learned arbitrator pronounced the judgment that the accident by which the respondent, one Michael M'Kinnon, a seaman, was injured arose out of and in the course of his employment. That judgment was, in my view, a decision on a matter of law—not in any sense a finding of fact, or an inference of fact drawn from previously established facts. It involves the construction of the statute, the determination of its meaning. Until that is ascertained it is impossible to decide whether the facts proved bring the case within it, or the contrary.

The question of law which is put for the opinion of the Court is as follows: Whether there was evidence upon which the arbitrator could competently find that the respondent met with an accident which arose out of and in the course of his employment.

The Second Division answer that question in the affirmative.

I own I am rather embarrassed by the form in which the question is put. The arbitrator being the sole judge of fact, his findings of fact, unless, as it is styled, he misdirects himself, cannot be set aside if there was before him evidence upon which he could reasonably find as he has found.

The Court which reviews his decision, just as the Court which reviews the verdict of a jury, may think that his finding was, on the evidence, erroneous, and that a finding to the very opposite effect would have been more in consonance with that evidence. Yet if there was evidence which was reasonably sufficient to support his finding it cannot be disturbed.

H. L. (Sc.) 1916 J. & P. HUTCHISON v. M'KINNON. Lord Atkinson.

A finding, however, in the very words of the statute, to the effect that the accident causing the injury of which the workman complains arose out of and in the course of his employment, may, in my view, cover three things :—

First, a finding as to what the nature and scope of the workman's employment was.

Next, what was the cause of his injury.

And third, whether upon those findings the case comes within s. 1 of the Workmen's Compensation Act of 1906.

To decide this latter point he must construe the statute, must determine its true meaning.

Ruling wrongly upon a question of law by an arbitrator is styled misdirecting himself. My point upon these findings in the words of the statute is this, that they may often involve decisions purely on points of law, often decisions on mixed questions of law and fact, and often decisions on questions of pure fact. Where they are of the first or second class it is wholly illegitimate, in my view, to apply to them the same rule as if they were of the third and last class.

A finding in the words of the statute may cover, indeed should cover, findings upon the question what was the sphere of the workman's employment. This may entirely depend upon or involve the construction of a written document or written documents—rules, for instance, regulating his work and describing his duties. The construction of such documents is a question of law.

It may, in addition, involve the decision of the question whether he was doing something outside the sphere of his employment when he met with the accident, or doing something within that sphere negligently and carelessly. These, if the construction of the written documents be once ruled upon, would almost invariably be questions of fact ; but if the arbitrator chooses to wrap them up in a finding in the words of the statute, it is difficult to disentangle his findings and separate them into their constituent decisions.

In my view, arbitrators should be encouraged to make it clear on the face of their report, award, or case stated, what rulings they design to make on any points of law which arise before them, and what rulings they design to make on questions of fact, so that one may readily judge whether or not they have misdirected themselves

in point of law, and whether their findings of fact are such as any reasonable man might arrive at upon the evidence.

In this case it is not a matter of importance, in my view, inasmuch as there is not any evidence on which the arbitrator could find as he has found. The respondent was a seaman, one of the crew of the steamship *Fastnet*. While his ship was in Spezzia Harbour, on August 16, 1913, he drank out of some kind of tin belonging to the boatswain and donkeyman of the ship what he took to be pure water. He was mistaken. It was not pure water. It was water into which the boatswain, one of the owners of the tin, had put some caustic soda for the purpose of cleaning the tin. The result was that the respondent's mouth and throat were badly burned. This is the injury in respect of which he sues.

There is no evidence as to what kind of tin this was, whether or not it was a tin such as was used on this ship for drinking water out of. It is stated that it was used by its owners for brewing tea.

The respondent found the tin on the deck immediately below the forecastle head, where there was sometimes a draught of air through the hawse pipe. Whether there was any such draught on this occasion is not stated. It is not stated whether he knew, or tried to find out, whose tin it was, or by tasting or inquiring tried to find out whether what it contained was fit for drinking or not, or who placed it there. Nor is it found whether the place where it was found was a usual place for cans with water in them to be placed in order that the water should get cool. For all that appears it may have been put by the boatswain in a place different altogether from where tins full of water for drinking purposes are placed, for the very reason that it was contaminated. The respondent simply saw the tin there with water in it, concluded it was put there in order that the water might get cool, and without more ado drank it.

No doubt the accident occurred to the respondent in the course of his employment, but, stopping there for a moment, there is nothing whatever to show that it arose out of his employment as a seaman. Any one on board the ship—a ship's carpenter, stevedore, coal porter, or a mechanic brought in to do something to the engines—might, as far as appears up to this, from the findings and facts stated, have done precisely the same.

H. L. (Sc.)
1916
J. & P. HUTCHISON v. M'KINNON.
Lord Atkinson.

There is nothing to show that the accident, to use Lord Moulton's words, is specifically connected with the respondent's employment as a seaman, and if that is so it could not be held to arise out of his employment. But this want is attempted to be supplied by statements or findings of fact utterly vague and ambiguous. These will be found in paragraphs 4, 5, and 6 of the case stated.

It is urged that the owners were bound by statute to supply water for the crew, under the Merchant Shipping Act of 1894. That no doubt is so. There is no evidence as to where the water which was supplied by the pump was taken from, whether from the condensers or from fresh-water tanks. Nor was there any finding that the water was not on this occasion reasonably potable. But it was found that whenever the water drawn from the pump was warm to the taste it was the practice of the crew to take it in tins or cans to a cool place and leave it to cool and then partake of it as required. But in what tins, to what cool place, and to be partaken of by whom ? The member of the crew who carried away the tin and put its contents to cool, or any other member of the crew who chose, with or without the permission of him who procured the water, to drink out of the tin ? Or, again, was any other person who happened to be on board, and not a seaman, who desired to drink out of it, permitted to do so ? All is left vague. Yet this vaguely described practice is the only practice which the officers of the ship are found to have sanctioned.

It is not found that the give-and-take custom referred to in paragraph 5 involved one man's drinking out of the tin of another without that other's consent, nor is it found that the officers of the ship either knew of or sanctioned such a practice. It is extremely difficult to suppose that the boatswain or any other member of the crew would carry water to cool for the use of any member of the crew, or of any other person who happened to be on board, and, without his own consent, permit it to be drunk, while it would be quite natural that he should carry it away and cool it for his own consumption.

If the ship had provided tins to be filled with water and placed in some particular place to cool, to be used by the different members of the crew in common, then the case might be entirely different, but this is the important matter on which the case stated is silent.

Lord Guthrie, with all respect, gets over the difficulty presented by the vagueness of the findings in the case stated by drawing for himself several inferences of fact which the arbitrator did not draw. He begins by saying that it was not said that in taking up this can, which he thought contained water, the respondent was doing anything not sanctioned by the officers of the ship. With all respect, that is reversing entirely the burden of proof. The ship was not obliged to prove that the officers did not sanction this kind of act. The burden of proving that they did sanction it lay on the respondent, who was the claimant.

Again, he said that it was necessary for the proper administration of the ship that the water should be cooled. Well, that depends very much on the heat at which it was delivered, and the cause of its being heated. If it was, though warm, reasonably potable, having regard to the climatic conditions, no such duty was cast upon the ship. Ice cold water is more palatable in warm climates than water made somewhat tepid by the sun's heat, but nobody could suggest that the ship was bound to ice the water for the crew, though bound to supply water reasonably potable. There was no proof that they had not in fact done so. Neither is there any evidence or finding that the ship did not provide means for cooling the water, as Lord Guthrie assumes, nor was there any evidence that the part of the forecastle where this tin of water was put to cool was one of the usual places where water was put to cool, or that the ship's officers were aware of the fact that it was usually put there, as Lord Guthrie surmises, nor yet, as he takes for granted, that the respondent went to the usual place to get water, or that the water was ever put there by one member of the crew for the use of other members.

Again as to the can, there is another reversal of the burden of proof. It is quite true that there is no evidence that the can was not one of the ordinary cans which in such circumstances would be expected to contain cold water. That is quite true, but there was no evidence that there was any ordinary can so used, or, if there was, what was its kind or description, or whether or not this can resembled it Surely it was the part of the respondent to prove affirmatively, if he could, that the can found was of the ordinary kind used for containing water and that it was found in the

H. L. (Sc.) 1916

J. & P. HUTCHISON v. M'KINNON.

Lord Atkinson.

place where water put to cool is usually found, or might be expected to be found, and that it was the practice for anybody, whether he brought the can there or not, to drink from it when disposed to do so without the consent of any one.

None of these things are found, nor is any evidence given to this effect, yet, because they are not found, the converse of them appears to have been assumed, and then the facts so assumed made the basis of the learned judge's decision.

In my opinion the risk of drinking drugged water out of a can belonging not to the drinker but to another member of the crew was not shown to be in any way specially connected with or reasonably incidental to the respondent's employment as a seaman on this ship, or that it arose out of that employment.

I therefore think that the decision of the Second Division of the Court of Session, concurred in, apparently, with some doubt by two out of its three members, was erroneous and should be reversed, and the question put in the special case should be answered in the negative.

My noble and learned friend Lord Parker of Waddington desires me to say that he agrees in omnibus with the judgment I have just delivered.

LORD SHAW OF DUNFERMLINE. (1) My Lords, I have some difficulties in this case. It arose in Scotland and was, of course, conducted in accordance with the Scotch law and procedure. The latter—the procedure—differs from that of England, and is the subject of separate treatment under statute.

Briefly stated it is as follows: By the Workmen's Compensation Act, 1906, s. 1, sub-s. 3, any question arising in any proceedings under the Act as to liability to pay compensation is to be settled by arbitration under the Second Schedule. That schedule, par. 17 (*b*), provides that in the application of this schedule to Scotland "any application to the sheriff as arbitrator shall be heard, tried, and determined summarily in the manner provided by section fifty-two of the Sheriff Courts (Scotland) Act, 1876." This is, however, "subject to the declaration that it shall be competent to either party within the time and in accordance with the conditions

(1) Read by Lord Sumner.

prescribed by Act of Sederunt to require the sheriff to state a case on any question of law determined by him," and his decision thereon may be submitted to the Court of Session for review, with appeal to this House. What " determined summarily " means is, as has been seen, in the manner provided by the Act of 1876. This signifies, in the words of s. 52, that the case is to be " disposed of in a summary manner in the sheriff court, without record of the defence or evidence."

There remains, therefore, to see what are the conditions under which a case is to be stated on a question of law. These conditions are contained in s. 17 of the Act of Sederunt of June 26, 1907, which were expressly framed as follows : " The following regulations shall apply to cases to be stated by a sheriff in virtue of the provision contained in paragraph 17 (*b*) of the Second Schedule appended to the Act." An application is to be made setting forth " the question (or questions) of law proposed as the subject matter of the case." If the parties do not agree as to " the terms of the case " these are to be settled by the sheriff. And (*d*) " the case shall be as nearly as possible in terms of Form II."

Form II.,—the " form of stated case "—after setting forth the names of the parties, thus proceeds : " This is an arbitration (*state concisely and without argument the nature of the application and the facts admitted or proved which raise the question* (*or questions*) *of law to be submitted on appeal*)."

A further provision (*g*) is of importance. It is as follows : The Court, besides having power to determine the case, give answers, and make orders as to costs, " may also, before giving their determination, send back the case to the sheriff for amendment." The law still stands upon this basis. By the Sheriff Courts (Scotland) Act, 1907, there is in s. 41 of the schedule a power given to the sheriff to order such procedure as he may think fit. This is in a " summary cause." But by s. 3 (i.) " applications under the Workmen's Compensation Act " are excepted from summary causes. The Sheriff Courts Act, 1913, makes no difference in this particular.

My Lords, I have thought it right to enumerate these things, because it thus becomes clear that the statement of facts must be taken as it is given by the sheriff, that there may be no written note of the evidence, and, even if there was, that it is the stated case alone

H. L. (Sc.) 1916 J. & P. HUTCHISON v. M'KINNON. Lord Shaw of Dunfermline.

which is the measure of the facts. A power is given to the Court of Session to have the case sent back for amendment, the intention being apparently to give the Court a power to have ambiguities cleared up, or essential particulars, inadvertently omitted, added by the sheriff.

No such amendment or addition was ordered in this case. The facts must therefore be taken exactly as they are found in the stated case. Any other version of the facts is illegitimate; if such a version is proceeded upon the decision may proceed upon grave and fundamental error.

With all respect to the learned judges of the Second Division, I think such a grave and fundamental error has occurred in this case. It is fair to Lord Hunter to observe that he thinks the case narrow and difficult, and that the Lord Justice-Clerk not only thinks that also, but goes on to say, "had this case been brought immediately after the Act was passed, I would have had no hesitation whatever in holding that the claimant had not a right to obtain compensation from his master in the present circumstances. But the matter has been so extraordinarily extended by decisions that have been pronounced in the past—decisions which I feel bound to submit to—that I cannot see sufficient grounds for differing."

My Lords, I humbly agree with the learned Lord Justice-Clerk that, judged by the Act, this case would fail. But the statute has not been either amended or repealed; I do not think, however difficult may be the task of reconciling the decisions, that they have produced a state of matters equivalent to such amendment or repeal. The Act still stands, and stands for our construction; and I say this—repeating myself and re-echoing your Lordships in other cases—the best guide out of many of the difficulties alluded to is to attend, and attend strictly, to the actual terms of the statute.

The judgment of the learned Lord Guthrie does, with respect, go beyond the stated case in important particulars. Whether these would justify the judgment need not be considered; the consideration would require to be most serious. But the stated case may be taken to have been neither ambiguous nor lacking in completeness in the view of the learned judges, and therefore not to require the exercise by the Court of its powers in such an event. No proposal was made that this House should exercise or assume

any jurisdiction in this particular. The additions made in Lord Guthrie's judgment to the facts mentioned in the stated case are challenged with vigour and in detail in the appellants' case; and, having fully considered the arguments at your Lordships' bar, I am of opinion that this challenge is well founded. I take the facts as they are duly presented to us by law, that is, in the stated case.

The seaman received his unfortunate injuries by drinking from a tin a mixture containing caustic potash, mistaking it for pure cold water. Whose was this tin? It was the property of the boatswain and donkeyman, who messed together and used it for making tea; and on the occasion it was being cleaned with caustic potash. It was not the property of the ship. There is no ground in the stated case for suggesting that it was of the same kind or size or pattern as tins belonging to the ship, if there were any such, or to other seamen, or to the respondent himself.

It does not, my Lords, appear to me to have been an incident of their employment that such a piece of private property should be used by others, with consequences inferring liability on the ship. The supply from the pump—for that the ship was responsible. For each seaman to cool it was reasonable and proper. But for one seaman to use his neighbour's or an officer's tin and drink its contents was to help himself for his own convenience from a vessel for whose condition the ship was in no way responsible; and it appears to me to be impossible to hold that ill effects arising solely from the use by one workman of the property of another arose out of the appellant's employment as a seaman.

I agree, accordingly, that the appeal should be allowed, and that the question put should be answered in the negative.

LORD SUMNER. My Lords, the accident, which happened to the respondent seaman in the course of his employment, was due to his own mistake in believing that a solution of caustic soda was pure cold water and in drinking it accordingly. The whole question is whether there was evidence that this accident arose out of his employment.

All we know of the affair is to be found in the stated case. There are no other competent materials. The facts proved or supposed to be proved in evidence are there carefully tabulated. The words

H. L. (Sc.) 1916 J. & P. HUTCHISON v. M'KINNON. Lord Sumner.

"I found upon these facts that the accident arose out of and in the course of his employment" do not state further evidence or a further fact found, but are the conclusion—be it one of law only or partly of law and partly of fact—to which the learned sheriff-substitute was led by his previous findings, and in his view it is implicit in them.

The can from which the respondent drank was not his own. We are not told that he made any mistake about this. It belonged to the boatswain and the donkeyman, who messed together. We know that they used it for brewing tea, but that carries us no further. We do not know whether they also used it for cooling their drinking water; we do not know whether it was like the tins used by others for cooling drinking water, or whether the tins used by others, who did not mess with the boatswain and the donkeyman, were similar to one another or diverse. It is true that its shape or character did not prevent the respondent from making his unfortunate mistake; but whether that was because of its similarity to other tins, or because he was too confident that it contained drinking water to be deterred by its difference from other tins, again we do not know. There is no evidence about it.

My Lords, in this state of the evidence I think that there is nothing to show any causal connection between the accident and the employment. The accident was one which might have happened to any one who drank the contents of a vessel that did not belong to him without first finding out what they were. It was in no way incident to a seaman's employment as such. Again, the sanction given by the ship's officers to the practice of leaving the ship's drinking water about in tins to cool might amount, and probably did amount, to an authority to the seamen to take this method of preparing for use the drinking water with which they had to be supplied; but it amounts to no more. There is no evidence that the sanction extended to the give and take which is spoken of. There is no evidence that the practice, by which seamen drank where they had not drawn, formed any part of the ship's routine or the men's employment. It may have been known to the officers—most things are that happen on board ship—but this is pure conjecture. I think that in doing what he did the respondent, so far as the evidence goes, added a risk of his own to the risks incident to his employment.

Where the question in debate is whether or not there is evidence to support a particular conclusion of fact, it is always necessary to begin by scrutinizing the evidence given, and this equally where there is a full note of the evidence, or only such a condensed summary of it as is given in this stated case. It is doubly necessary to be strict where the appellate tribunal must take the facts as found and is limited to the question of law, namely, whether there was evidence to support the conclusion. With all respect to Lord Guthrie, I think that such an expansion of the stated case by interpretation and inference as his judgment contains is inadmissible.

My Lords, if any distinction at all is to be drawn, as, of course, it must be drawn, between arising " out of " and arising " in the course of " an applicant's employment, the stated case discloses no evidence of arising " out of." To hold that it does is either to make " arising out of " and " arising in the course of " mean the same thing, or is to carry the evidence by conjecture beyond the limits of the case. I think that the appeal should be allowed.

Interlocutor of the Second Division of the Court of Session in Scotland reversed. The respondent to pay the costs of the action in the Court of Session and also the costs of the appeal to this House.

Lords' Journals, February 1, 1916.

Agents for appellants: *Holman, Birdwood & Co., for Maclay, Murray & Spens, Writers, Glasgow, and J. & J. Ross, W.S., Edinburgh.*

Agents for respondent: *Herbert Z. Deane, for Thos. Scanlan & Co., Solicitors, Glasgow, and E. Rolland McNab, S.S.C., Edinburgh.*

[HOUSE OF LORDS.]

H. L. (E.)* 1916 Jan. 21.

HORLOCK . . . . . Appellant;

AND

BEAL . . . . . Respondent.

Ship—Seaman—Wages—Termination of Service—Detention in Enemy Port—Imprisonment of Crew—"Loss of the Ship"—Merchant Shipping Act, 1894 (57 & 58 *Vict. c.* 60), *ss.* 143, 158.

A British ship during a voyage for which a British seaman had signed articles, being in a German port when war was declared between the United Kingdom and the German Empire, was immediately detained, and some months later the crew were imprisoned. The ship was still detained and the crew imprisoned when this action for an allotment of wages was commenced:—

Held—(1.) that the detention of the ship did not constitute "the loss of the ship" within s. 158 of the Merchant Shipping Act, 1894; but (2.) (Lord Parmoor dissenting) that the seaman ceased to be entitled to his wages as soon as the further performance of the contract became impossible; (3.) by Lord Atkinson, Lord Shaw of Dunfermline, and Lord Wrenbury, that the further performance of the contract had become impossible from the date of the detention of the ship; by Earl Loreburn from the date of the imprisonment of the crew.

Hadley v. *Clarke* (1799) 8 T. R. 259 and *Beale* v. *Thompson* (1804) 4 East, 546 distinguished.

Decision of the Court of Appeal [1915] 3 K. B. 627 reversed.

Appeal from an order of the Court of Appeal (1) affirming a judgment of Rowlatt J. (2)

The action was brought on April 10, 1915, by the respondent (hereinafter called the plaintiff) for certain moneys alleged to be due from the appellant (hereinafter called the defendant) under an allotment note dated May 21, 1914. The action was tried upon an agreed statement of facts.

The plaintiff was the wife of Tom Rea Beal, who on May 21, 1914, signed articles at Hull as second mate on board the steamship *Coralie Horlock*, belonging to the defendant. In accordance with the provisions of ss. 140 and 141 of the Merchant Shipping Act, 1894,

* *Present:* Earl Loreburn, Lord Atkinson, Lord Shaw of Dunfermline, Lord Parmoor, and Lord Wrenbury.

(1) [1915] 3 K. B. 627. (2) [1915] 3 K. B. 203.

and s. 61 of the Merchant Shipping Act, 1906, Beal required a stipulation for the allotment of his wages by means of an allotment note to be inserted in the articles. So far as material the articles were as follows :—

"The several persons whose names are hereto subscribed and whose descriptions are contained herein . . . . hereby agree to serve on board the said ship in the several capacities expressed against their respective names on a voyage of not exceeding two years' duration to any ports or places within the limits of 75 degrees North —60 degrees South latitude commencing at Hull, proceeding thence to Alexandria and/or any other ports within the above limits ; trading in any rotation, and to end at such port in the United Kingdom or Continent of Europe (within home trade limits) as may be required by the master . . . . and it is also stipulated that advances on account and allotments of part of wages shall be made as specified against the names of the respective seamen in the columns provided for that purpose."

Beal's wages were 9*l.* 10*s.* per calendar month.

Pursuant to the said request and stipulation an allotment note was duly issued upon May 21, 1914, in favour of the plaintiff for the sum of 4*l.* 15*s.* to be paid by the defendant to the plaintiff monthly during the period of the articles, the first payment to be made on June 22, 1914.

The vessel sailed from Hull at the end of May, 1914, upon the voyage in respect of which Beal had signed the articles aforesaid, and proceeded to Alexandria and from thence to other ports, arriving at Hamburg on August 2, 1914.

On and after August 4, 1914, a state of war existed between the United Kingdom of Great Britain and Ireland and the Empire of Germany.

The vessel was then and still remained in the port of Hamburg and was unable to leave the said port by reason of detention by the German authorities.

The defendant had been since August 4, 1914, and still was deprived of the possession of this vessel, and Beal with the officers and other members of the crew was on or about November 2, 1914, removed from the vessel to a lodging ship in Hamburg, and on or about November 8 was interned at Ruhleben, near Berlin.

H. L. (E.) 1916 HORLOCK v. BEAL.

The defendant had paid to the plaintiff under the allotment note 4*l.* 15*s.* on June 23, 4*l.* 15*s.* on July 22, and 1*l.* 13*s.* 8*d.* on August 2, 1914, and no more.

The defendant had failed or refused to pay to the plaintiff any further sums under the allotment note.

The plaintiff contended that Beal's wages were due and payable by the defendant under the articles until he should be discharged in accordance with the terms of the articles and the provisions of the Merchant Shipping Act, 1894, and she claimed to be paid by the defendant the monthly sum of 4*l.* 15*s.* under the terms of the allotment note until such discharge.

The defendant contended that he was not liable to pay Beal any wages after August 4 and was consequently not liable to make any further payment to the plaintiff.

Rowlatt J. gave judgment for the plaintiff for 40*l.*, being the amount of the allotments due up to the date of the issue of the writ, and his judgment was affirmed by the Court of Appeal by a majority (Swinfen Eady and Bankes L.JJ., Phillimore L.J. dissenting).

1915. Dec. 6, 7. *George Wallace, K.C.*, and *Norman Raeburn*, for the appellant. The seaman's engagement was terminated either (1.) by reason of the loss of the ship under s. 158 of the Merchant Shipping Act, 1894, or (2.) alternatively at common law by reason of the frustration of the venture, and this termination occurred either when the ship was seized at the outbreak of the war or at the latest when the crew were interned. As to (1.), the detention of the vessel by the German authorities amounted to a hostile capture and created a loss of the vessel within s. 158 of the Merchant Shipping Act, 1894. The principle of *The Olympic* (1), which was a decision upon the word " wreck " in that section, applies. As to (2.), s. 158 is not exhaustive, and at common law where the interposition of the superior Power is such that of necessity there can be no continuance of the service, the basis of the contract is gone, the commercial venture as between the owner and the seaman has been frustrated, and consequently the seaman ceases to be entitled to his wages. The German authorities, by taking possession of the ship for an

(1) [1913] P. 92.

indefinite period, have prevented the seaman from rendering any of the services for which he was engaged on board the ship. The capture of a ship by a hostile Power puts an end to the right of wages : *Wiggins* v. *Ingleton* (1) ; and a detention in time of war for an indefinite period stands on the same footing. *Beale* v. *Thompson* (2), on which the Court of Appeal proceeded, is distinguishable. That was a case of a temporary embargo put on in time of peace, and after six months the vessel was restored and the voyage resumed, and the freight, out of which alone wages were then payable, was earned. It was there held that the seamen were entitled to their wages during the period of detention. The basis of that decision was that the return of the seamen to the ship and the resumption of the voyage under the original articles operated as a waiver by the owner of any objection to the continued existence of the contract. *Delamainer* v. *Winteringham* (3) is to the same effect. *Hadley* v. *Clarke* (4) is wholly inapplicable to the conditions of modern commerce, and its authority is seriously impaired by *Jackson* v. *Union Marine Insurance Co.* (5) *Hadley* v. *Clarke* (4) was the foundation of the dissenting judgments of Bovill C.J. in the Court of Common Pleas and Cleasby B. in the Exchequer Chamber ; but their views did not prevail, and it was held that the venture was frustrated in a commercial sense by the delay which had occurred. An act done by public authority which renders the further performance of the contract impossible operates as a dissolution of the contract, and it matters not whether the frustration of the venture arises from an act done to the shipowner or to the seamen : *Melville* v. *De Wolf.* (6) This case falls within the principle of *Esposito* v. *Bowden* (7), *Geipel* v. *Smith* (8), and *Embiricos* v. *Sydney Reid & Co.* (9) In considering the question of frustration there is a distinction between an embargo as an act of war and a civil embargo : *The Teutonia.* (10)

(1) (1705) 2 Ld. Raym. 1211.
(2) 4 East, 546 ; (1813) 1 Dow, 299.
(3) (1815) 4 Camp. 186.
(4) 8 T. R. 259.
(5) (1873) L. R. 8 C. P. 572 ; (1874) L. R. 10 C. P. 125.
(6) (1855) 4 E. & B. 844.
(7) (1857) 7 E. & B. 763, 792.
(8) (1872) L. R. 7 Q. B. 404, 414.
(9) [1914] 3 K. B. 45.
(10) (1871) L. R. 3 A. & E. 394, 412.

H. L. (E.) 1916

HORLOCK v. BEAL.

[EARL LOREBURN referred to *Baily* v. *De Crespigny* (1), cited in Pollock on Contracts, 8th ed., p. 426.]

Greer, *K.C.*, and *Alex. Neilson*, for the respondent. There are special principles which distinguish a contract with a seaman from an ordinary commercial contract. A seaman is entitled to special consideration, because for the time being he gives his whole life to his employer: see *Caine* v. *Palace Steam Shipping Co.* (2) By marine usage, if a seaman is willing to serve, the fact that he is prevented from serving by something beyond his control does not deprive him of his right to recover his wages till the end of the voyage, and it is immaterial whether the occurrence which prevents him from fulfilling his contract is some physical disability or is the detention of the ship, provided there has been no abandonment of the voyage: *Chandler* v. *Grieves* (3); *Beale* v. *Thompson*. (4) The decision in the latter case was not put simply on the renewal of the voyage, but was based to some extent on the ground that detention by a hostile act which was not the fault of either party to the contract did not put an end to the engagement. There has been no final settlement of this seaman's wages within s. 134 (*c*) of the Merchant Shipping Act, 1894, and until such time his wages continue to be payable unless the contract has been absolutely put an end to. As regards s. 158, so far as it deals with events happening to the ship, it is exhaustive. On the construction of the section "loss" means physical loss—the loss of the ship itself, not the loss of the use of the ship. It has never been held that the frustration of a particular voyage is the loss of the ship within the meaning of this section. It may be that capture plus condemnation is such a loss, but in any event detention is not covered by the section: *Austin Friars Steam Shipping Co.* v. *Strack* (5); *Sivewright* v. *Allen* (6); *Andersen* v. *Marten*. (7) What is a "wreck" within the section is a different question.

Apart from the section, detention of the ship by an act of war does not put an end to the seaman's engagement: *Hadley* v. *Clarke* (8); *Beale* v. *Thompson* (4); *Delamainer* v. *Winteringham* (9);

(1) (1869) L. R. 4 Q. B. 180.
(2) [1907] 1 K. B. 670, 681; affirmed [1907] A. C. 386.
(3) (1792) 2 H. Bl. 606, n.
(4) 4 East, 546; 1 Dow, 299.
(5) [1905] 2 K. B. 315, 320.
(6) [1906] 2 K. B. 81.
(7) [1908] A. C. 334.
(8) 8 T. R. 259.
(9) 4 Camp. 186.

Pratt v. *Cuff*. (1) Capture of itself would not determine his right to wages, and detention of itself is something less than capture. *Jackson* v. *Union Marine Insurance Co.* (2) has no bearing on this case, for, first, it only applies to a voyage which has not been begun; and, secondly, it was an insurance case, and the question there was, had the ship lost her freight. It has never been applied to a contract of employment. Nowadays, since wages no longer depend on freight, there is no joint adventure of the owner and the crew, and in this respect the seaman stands in the same position as any other servant. *Hadley* v. *Clarke* (3) was recognized as good law by Bramwell B. in *Jackson* v. *Union Marine Insurance Co.* (2) It is for the owner to show that the seaman has become disentitled to his wages, and he does not discharge that onus by showing that the vessel is detained for an indefinite period and that the men are imprisoned.

George Wallace, K.C., in reply, on the question whether the capture of itself amounted to the loss of the ship, cited *The Governor Raffles* (4); *The Friends* (5); *Goss* v. *Withers* (6), cited with approval by Lord Halsbury in *Andersen* v. *Marten* (7); on the special position of seamen, *The Elizabeth* (8); and, as to the effect of the supervention of war on seamen's engagements, *O'Neil* v. *Armstrong, Mitchell & Co.* (9)

The House took time for consideration.

1916. Jan. 21. EARL LOREBURN. My Lords, this is a case of great importance at the present time. A seaman had the misfortune to be serving on a British ship which entered the port of Hamburg on August 2, 1914. The ship was detained by the German authorities when on August 4 war broke out.

Ever since that date the ship and the crew have been detained in Germany. We do not know whether the ship has been condemned or not, but we know that she has been kept and her crew imprisoned.

(1) (1798) cited in 4 East, 43.
(2) L. R. 10 C. P. 125.
(3) 8 T. R. 259.
(4) (1815) 2 Dods. 14.
(5) (1801) 4 C. Rob. 143.
(6) (1758) 2 Burr. 683.
(7) [1908] A. C. 334, 340.
(8) (1819) 2 Dods. 430.
(9) [1895] 2 Q. B. 418.

H. L. (E.) 1916

HORLOCK v. BEAL.

Earl Loreburn.

From August 4 till November 2 they were kept as prisoners on their own ship, and on November 2 were removed to other places of confinement.

In these circumstances this seaman's wife sues on an allotment note. Her right to recover admittedly depends on the question was the seaman entitled to his wages for the period from August 2 to April 10, 1915? His contract of service required him to serve on the ship *Coralie Horlock* for a voyage not exceeding two years in duration. These articles were signed on May 21, 1914. An allotment note was issued in favour of the present plaintiff for a monthly payment of 4*l.* 15*s.*

In my view the first question to be decided is whether or not, and at what date, the performance of this contract of service became impossible, which means impracticable in a commercial sense. It was at first possible that she might be released in accordance with a practice which has been common in former wars and is recommended, though not required, by the Hague Convention.

But the removal of the crew from their ship and their imprisonment elsewhere, and the lapse of time, made it clear that whatever hope there may have been of restoration could no longer be entertained. Looking back upon what happened, we may think that there never was any hope. Or we may think that there was a period of suspense during which it was not determined whether there should be, in accordance with common practice, a release on both sides of ships so situated. There is hardly anything to help us, except the fact that the men were detained on their own ship till November 2. On the whole it seems to me that there was a period of suspense, and, judging as best I can, I take November 2 as the date. It is a surmise, but the opposite view also is a surmise on what is a question of fact.

Assuming this to be so, does that impossibility of performance dissolve the contract of service and disentitle the seaman to wages from that time onwards? The law, both as it is found in the statute book and as it has been administered in Admiralty Courts, has always been in some respects peculiarly tender and benevolent towards seamen in regard to their contracts of service, though in earlier days with a notable exception embodied in the maxim that

freight is the mother of wages. That was a cruel exception, which has been removed now by Act of Parliament. Yet it has always to be remembered in scrutinizing the older decisions, because what prevented freight from being earned might prevent wages from being recoverable.

Is there, then, either in any Act of Parliament or in admiralty law, any rule which prescribes the effect of such a detention by the enemy as makes the performance of a contract of service impossible? There is no proof of condemnation by a Court.

We were referred to s. 158 of the Merchant Shipping Act. That section tells us what is to be done in regard to wages if there is a wreck or loss of the ship. In my opinion these words refer to physical loss. It is true that a ship is lost to her owner in a real sense when she has been captured and condemned by a competent Court. It was argued that she may be actually lost to her owner by a prolonged detention. But if I am right in thinking that both the words used in this section, namely, "wreck" and "loss," refer to the ship herself and to her physical condition, then they have no bearing on this case. I will merely add that the Court of Appeal in *The Olympic* (1) did not decide anything inconsistent with this view. They merely used the frustration of the voyage as a test by which to determine whether or not the physical injury inflicted amounted to "wreck."

Coming to the law as administered in admiralty, three cases were cited with a view of showing that prolonged detention of a ship and its crew by a foreign Power did not dissolve a seaman's contract of service. Two of these authorities are in 4 East, namely, *Beale* v. *Thompson* (2) and *Pratt* v. *Cuff* (3), the former of which was affirmed in this House more than a hundred years ago, but there is no record to show on what grounds. The third is a case at nisi prius, *Delamainer* v. *Winteringham* (4), in 4 Campbell's Reports. They are cases in which ships and crews were confined for a long time but were ultimately released, and the interrupted voyage completed so as to earn freight and therefore wages. It was held that wages continued to be payable throughout. This could be supported, and was supported in the judgments, on the ground that both

(1) [1913] P. 92
(2) 4 East, 546; 1 Dow, 299.
(3) 4 East, 43.
(4) 4 Camp. 186.

H. L. (E.) 1916 HORLOCK v. BEAL. Earl Loreburn.

employers and employed treated the service as not terminated by the temporary interruption, though there are passages in the judgments which admit of a broader interpretation. There is no distinct authority for the proposition that if a seaman is willing to fulfil his contract he is still entitled to wages, though the performance of it has been made impracticable on both sides by a prolonged captivity. Accordingly neither statute nor admiralty law provides special guidance, and I must recur to the common law. The contract was for service on a ship for a voyage within a period of two years. Both ship and crew were forcibly detained; the contemplated service became impracticable, so far as I can judge, on November 2, 1914. Had the ship and crew been released on November 2 I do not think common law would have treated the contract of service as ended, and I do not think the chance of her release was ended before November 2.

In my opinion, neither party was any longer bound by that contract from that date. If they were bound it must mean that wages were to be paid, without any service in return, for the entire duration of this war, or, in the present case, till the expiry of two years from the commencement of the service. The Napoleonic war after the rupture of the Peace of Amiens lasted for eleven years. I think it was an implied term of this service, subject to any special law affecting seamen, that it should be practicable for the ship to sail on this voyage, in that sense which disregards minor interruptions and takes notice only of what substantially ends the possibility of the service contemplated being fulfilled. Both employer and employed made their bargain on the footing that, whatever temporary interruption might supervene, the ship and crew would be available to carry out the adventure.

Accordingly I think that the appeal should be allowed in respect of the period after November 2. I learned with satisfaction that provision is to be made for cases of this kind from public funds. It cannot, of course, affect the decision of a Court of law, but it is in accordance with the spirit which has always influenced both Courts of law and the Legislature in dealing with a deserving class of men. The shipowners in this case have brought it before the Courts in order to settle the law, which has been in doubt, and are not open to any reflection.

LORD ATKINSON. My Lords, the main facts have been already stated by my noble and learned friend who has preceded me.

The *Coralie Horlock* sailed from Hull at the end of May, 1914, on the contemplated voyage to Alexandria, and from thence to other ports, and arrived at Hamburg, a port within the limits, on August 2, 1914. War having broken out between Great Britain and the German Empire on August 4, 1914, this ship has, from that date up to the present time, been detained in Hamburg by the German Government. The appellants have entirely lost the use of her. Her officers and crew were upon November 2 removed to a lodging ship in Hamburg, and on November 8 were interned at Ruhleben, near Berlin, where they still remain.

The Hague Convention makes certain provisions touching the fate of a ship belonging to one of the belligerents found at the commencement of hostilities in the port of another belligerent. If Germany should observe these provisions the ship will not be confiscated. I utterly refuse to assume that she will do so. The respondent has failed to prove that the ship has been confiscated. What has happened to her since her detention began has not been proved. She may have been destroyed, or sent elsewhere, or devoted to some particular use. The only thing certain about her fate is that the appellant has been absolutely deprived of the use of her since August 4, 1914, and that her crew have been interned as prisoners of war.

The sole question for decision on this appeal is whether the admitted facts establish satisfactorily that the respondent's husband, Tom Rea Beal, ceased to be entitled to 9*l.* 10*s.* per month on August 4, 1914, or if not, then at what later date if at all.

The ancient doctrine that freight was, as it was said, the mother of wages, that the crew and the owners of the ship were co-adventurers in the enterprise of earning freight out of which the seaman was to be paid, has been abolished by s. 157 of the Merchant Shipping Act of 1894, and the seaman is now entitled to be paid his wages, whether freight be earned or not. Still his contract is a contract to render his service for the achievement of the adventure or adventures upon which it is contemplated by both parties to his contract the ship is to embark, and though, undoubtedly, many provisions of the Merchant Shipping Act are framed to protect sailors from the

H. L. (E.) 1916 HORLOCK v. BEAL. Lord Atkinson.

result of their well-known improvidence, still there is no reason whatever why a rule of law applicable to contracts in general should not be applied to the contracts of seamen, where these latter are not expressly or impliedly excluded from its operation. The rule I refer to is laid down by Blackburn J. in the case of *Taylor* v. *Caldwell* (1) in these words: "Where there is a positive contract to do a thing, not in itself unlawful, the contractor must perform it or pay damages for not doing it, although in consequence of unforeseen accidents, the performance of his contract has become unexpectedly burthensome or even impossible. . . . . But this rule is only applicable when the contract is positive and absolute, and not subject to any condition express or implied: and there are authorities which, as we think, establish the principle that where, from the nature of the contract, it appears that the parties must from the beginning have known that it could not be fulfilled unless when the time for the fulfilment of the contract arrived some particular specified thing continued to exist, so that, when entering into the contract, they must have contemplated such continuing existence as the foundation of what there was to be done; there, in the absence of any express or implied warranty that the thing shall exist, the contract is not to be construed as a positive contract, but as subject to an implied condition that the parties shall be excused in case, before breach, performance becomes impossible from the perishing of the thing without default of the contractor."

This principle applies not only to contracts in their executory stage, but when they have been in part performed.

In *Appleby* v. *Myers* (2) the rule was, by the judgment of the Exchequer Chamber, applied to the case where the plaintiff contracted to erect certain machinery on the defendant's premises and to keep it in repair for two years, the price to be paid after the completion of the work. After some portions of the work had been finished and others were in course of completion the premises and all the machinery and materials were destroyed by an accidental fire.

It was held that both parties were excused from the further performance of the contract, and that the provision as to the

(1) (1863) 3 B. & S. 826, 833. (2) (1867) L. R. 2 C. P. 651.

payment of the price only after completion disabled the plaintiff from recovering anything in respect of the work done by him.

In *Howell* v. *Coupland* (1) it was applied to a case where a crop which was sold perished by disease.

In *Baily* v. *De Crespigny* (2) the performance of a covenant was rendered impossible by an Act of Parliament, and the covenantor was held to be discharged.

In *Krell* v. *Henry* (3) it was applied to a case where a flat in Pall Mall was hired in order to see the contemplated procession on the occasion of the coronation of His late Majesty King Edward VII., which ceremony was postponed. The contract of hiring did not contain any express reference to the procession, but it was held that the proper inference to be drawn from the surrounding circumstances was that both parties to the contract contemplated the taking place of the procession along the proclaimed route as the foundation of the contract.

In *Melville* v. *De Wolf* (4) the impossibility arose from an act of State as the primary cause. The plaintiff in the action was a seaman who had signed articles to serve on a voyage to the Pacific and back to a port in the United Kingdom for a term of three years at 7*l.* per month. The captain was sent home from Monte Video by a naval Court, constituted under the Mercantile Marine Act of 1850, to be tried for shooting one of the crew. The plaintiff was sent home by the same Court as a witness against him, and he attended the trial in this country in that capacity. When the trial was over the ship was in the Pacific, and it was practically impossible for him to return to her. The plaintiff claimed wages at the above rate up to the time the trial terminated. The defendant paid into Court a sum sufficient to cover the plaintiff's wages up to the time he left his ship. It was held that he was not entitled to any wages after he left the ship. Lord Campbell C.J., in delivering judgment, said: "After he was sent home from Monte Video to England, he neither served under the articles actually, nor constructively: and, as from that time the relation of employer and employed could not be renewed within the scope of the original hiring, we think that the contract must then be considered as dissolved by

(1) (1876) 1 Q. B. D. 258.
(2) L. R. 4 Q. B. 180.
(3) [1903] 2 K. B. 740.
(4) 4 E. & B. 844, 849.

H. L. (E.) 1916 — HORLOCK v. BEAL. — Lord Atkinson.

the supreme authority of the State, which is binding on both parties."

It will be observed that the contract so dissolved was not a mere executory contract, but a contract in part performed.

In the case of *The Friends* (1) the impossibility was the result of the act of a hostile State. The plaintiff's ship, a British ship manned by a British crew, was in the course of a voyage from London to Newcastle and back captured by a French privateer. The plaintiff and some members of the crew were taken, as prisoners of war, to France, not because of their special connection with this particular ship, but because they were British subjects. While they were in custody the ship was recaptured, which as far as possible, according to law, restored the antecedent condition of things; but a new hand had been hired to fill the plaintiff's place. The ship continued her homeward voyage and reached the Port of London.

The plaintiff sued for the wages which would have been due to him had he served on the homeward journey. Sir William Scott (as he then was), in giving judgment, said: "Nothing can be better settled, than that the act of capture defeats all rights and interests; but it is contended, that the former interest revives upon the recapture. . . . . The claimant was not on board at the recapture, but had been sent a prisoner to France, whilst the owner was obliged to hire another person in his place, to work the vessel on the returned voyage. Under these circumstances, the utmost that could be demanded, with any shew of reason, would be the small portion earned prior to the capture, two days' service, and that subject to salvage. Beyond this it is impossible to advance a pretension; for what right can a person in captivity have, to demand the benefit of the labour of those, who carried the ship on to London? or, still more, of those who were hired in his place for the returned voyage."

The contract in this case also was in part performed, but the service in aid of the adventure which the parties to the contract contemplated the seaman should render in return for his wages was made impossible by his incarceration, and each party to the contract was held, therefore, to be relieved of the obligation it imposed.

(1) 4 C. Rob. 143, 144.

In my opinion the provision contained in the 158th section of the Merchant Shipping Act of 1894 to the effect that the service of a seaman and his title to wages cease when his ship is lost is but a statutory application of this same principle.

I think that the loss referred to in this section does not mean merely the loss of the use of the ship, but physical loss. Physical loss, however, is not to be confined to the foundering of the ship, or such like, but physical loss as defined in the judgment of Maule J. in *Moss* v. *Smith* (1), applicable generally to mercantile contracts, and approved of by Lord Blackburn in *Dahl* v. *Nelson, Donkin & Co.* (2) Maule J. said: "It may be physically possible to repair the ship, but at an enormous cost: and there also the loss would be total; for, in matters of business, a thing is said to be impossible when it is not practicable; and a thing is impracticable when it can only be done at an excessive or unreasonable cost. . . . . If a ship sustains such extensive damage, that it would not be reasonably practicable to repair her,—seeing that the expense of repairs would be such that no man of common sense would incur the outlay,—the ship is said to be totally lost."

Lord Blackburn points out that, though these words were used in the case of a policy of insurance, they were spoken generally of mercantile contracts, and that it was on the principle thus laid down that *Geipel* v. *Smith* (3) and *Jackson* v. *Union Marine Insurance Co.* (4) were decided. It was contended that this s. 158 is exhaustive, and that no loss other than the physical loss there referred to can terminate the seaman's contract, or his right to wages. In my opinion that is wholly erroneous. It leaves out of consideration effective capture by a belligerent which transfers the property in the ship from its owners to the captor and enables that captor to give an effective title to his vendee, and it also leaves out capture by pirates, which transfers the possession and custody of the ship, though not her ownership.

The above-mentioned cases are clearly distinguishable from *Beale* v. *Thompson* (5), as was pointed out by Lord Campbell in *Melville* v. *De Wolf*. (6) In the former case the ship went out in

(1) (1850) 9 C. B. 94, 103.
(2) (1881) 6 App. Cas. 38, 52.
(3) L. R. 7 Q. B. 404.
(4) L. R. 10 C. P. 125.
(5) 4 East, 546, 565.
(6) 4 E. & B. 844.

H. L. (E.) 1916 HORLOCK v. BEAL. Lord Atkinson.

ballast from England to St. Petersburg to bring cargo from thence to London, and was to be paid freight by the ton. The Emperor Paul of Russia, though at peace with England, had this ship, with others, seized and her crew imprisoned. On his death, in six months, the ship and crew were released. They were taken back on board of their ship, got her cargo, navigated her back to England, and earned the proper freight. Lord Ellenborough, in delivering judgment, approved of and relied upon the doctrine laid down in different words by Lord Hardwicke in *Rex* v. *Inhabitants of Castlechurch* (1) and in *Rex* v. *Inhabitants of Eaton* (2) respectively, to the effect, in the first place, that "where a servant returns, and the master receives him, it is always esteemed a dispensation of the master, and helps the discontinuance, and works in the nature of a remitter," and, in the second, that, "the absence of the servant for three weeks was purged by the master's receiving him again, which ought to be considered in that case as a dispensation; and, in strictness of law, he still continued in the service of the master, notwithstanding such absence."

Lord Ellenborough held that owing to the terms upon which the ship was released, and the property belonging to the ship and the crew restored or compensated for, under the order of the Russian Government (3), there was no capture, notwithstanding the hostile nature of the seizure, and laid it down that the right of a mariner to wages depends, first, on his earning freight for his owners on that voyage for which he was hired, and, secondly, upon the performance by the mariner of the service he has agreed to perform in respect of his owners during the voyage.

The jury found that the plaintiff had performed his services properly, and the freight was admittedly earned. And, taking these three facts into consideration, the reception back of the plaintiff by the owners into their service, the earning of the freight, and the proper performance by the plaintiff of his service, it was held that he was entitled to his wages during the time of his captivity and until he reached London on the return voyage.

Delamainer v. *Winteringham* (4) is to the same effect.

In the present case the owners have not taken back the seaman Beal into their service. On the contrary they insist that the contract

(1) (1735) Burr. S. C. 68, 70.
(2) (1734) Burr. S. C. 47, 48.
(3) 4 East, 551.
(4) 4 Camp. 186.

with him is at an end, and that his right to wages has been determined.

In *Wiggins* v. *Ingleton* (1) a seaman, after serving three months on a voyage from Carolina to London, was impressed, under the Queen's authority, before reaching the delivery port. It was held that even though the ship reached that port he was only entitled to wages pro tanto for the time he actually served.

In *Dahl* v. *Nelson, Donkin & Co.* (2) Lord Blackburn said that it was "held in *Geipel* v. *Smith* (3) by the whole Court, and in *Jackson* v. *Union Marine Insurance Co.* (4), by the majority in the Common Pleas, and in the same case in error by a majority of the Court of Exchequer Chamber, that a delay in carrying out a charter-party, caused by something for which neither party was responsible, if so great and long as to make it unreasonable to require the parties to go on with the adventure, entitled either of them, at least while the contract was executory, to consider it at an end."

Lord Watson, on pp. 61 and 62, analysed these two cases at length, and approved of the decisions in them, and Lord Selborne stated he had read the judgments of his two colleagues and concurred in them.

In the first of these cases the defendant vessel had been chartered by the plaintiff to load at a particular place a cargo of coals to be taken to Hamburg. Before any breach of the agreement the port of Hamburg had been blockaded by the French fleet, and the Queen of England had by proclamation enjoined her subjects to strict neutrality and not to commit any violation of the law of nations. Thereupon the voyage to Hamburg became illegal. The defendant refused to load his ship, and it was held he was justified in so doing, as the charterparty was for a single adventure to commence at once, and the contract being executory the further performance of it within a reasonable time was prevented by an excepted cause—the blockade, which was a restraint of princes.

Lush J., in giving judgment put the pith of the case thus. He said (5): "If the impediment had been in its nature temporary I should have thought the plea bad; but a state of war must be presumed to be likely to continue so long, and so to disturb the

(1) 2 Ld. Raym. 1211.
(2) 6 App. Cas. 38, 53.
(3) L. R. 7 Q. B. 404.
(4) L. R. 10 C. P. 125.
(5) L. R. 7 Q. B. 414.

H. L. (E.) 1916

HORLOCK v. BEAL.

Lord Atkinson.

commerce of merchants, as to defeat and destroy the object of a commercial adventure like this."

It is not necessary, therefore, in such a case to wait till the delay has occurred. It is legitimate to come to the conclusion that the delay caused by war will be so long and so disturbing to commerce as to defeat the adventure and to act accordingly at once.

In the second case the plaintiff, a shipowner, entered into a charter-party dated in November, 1871, by which his ship was to proceed with all despatch from Liverpool to Newport and there load a cargo of iron rails for San Francisco. The plaintiff effected an insurance on the chartered freight. The ship sailed from Liverpool on January 2, and ran aground on the following day in Carnarvon Bay. On February 15, while she was aground, the charterers threw up the charterparty and chartered another ship. On the 18th she was floated, but the necessary repairs could not be effected till August. The plaintiff sued on the policy for the chartered freight. The jury found that the time necessary for getting the ship off and repairing her was so long as to put an end to the adventure in a commercial sense.

This, according to Bramwell B., as he then was, amounted to a finding that the voyage the parties contemplated had become impossible, and that a voyage undertaken after the ship had been repaired would have been a different voyage, a different adventure, and he held that there was an implied condition precedent in the contract that the ship should arrive at the port of loading in a reasonable time, the non-performance of which not only gave the charterer a cause of action, but released him from the contract, that he was not bound to load the ship, and that there was therefore a loss of the charterer's freight by perils of the sea.

The charterer did not wait till a reasonable time had elapsed before he repudiated the contract. He did that at once when a long delay in the process of repairing was reasonably probable.

In a case tried before Sir William Scott, as he then was, he practically applied, many years earlier, the same principle to an executed contract, namely, the case of *The Elizabeth*. (1) This vessel sailed from London to St. Petersburg, took in cargo there, and started on her return voyage. She grounded on a reef of rocks at Gothland,

(1) 2 Dods. 403, 408, 411.

was floated, and brought to Ostergman, where she was beached in order to examine her injuries. She was so damaged that she could not be repaired within the Baltic season, i.e., when the Baltic was sufficiently free from ice to be navigable. Though it is a general rule that a captain cannot discharge his crew in a foreign port, it was held that, under these circumstances and having regard to the anticipated delay, he was clothed with authority in this case to do so. He did discharge them, against their will (as it was taken to be), at once, making provision for their passage home to England. The ship returned to England in the month of April following, manned by a new crew. The plaintiff sued for wages up to the time of the return of the ship to the home port. It was held that he was only entitled to wages up to the date of his discharge. The learned judge, Lord Stowell, said: "The ship here had proceeded on the original voyage, under the expectation, entertained on both sides, that she would return in the ordinary course of such a voyage. A total loss by wreck happens. This operates as a total loss of wages. There may be cases of misfortune much short of this semi-naufragium, which were not occasioned by default of either party; but where it has arisen from the vis major, the act of God, which neither party had in contemplation at the time of the contract. . . . . I am, therefore clearly of opinion that they have no right to charge, as they have done in this case, for wages up to the return of the *Elizabeth*. If they had staid by the *Elizabeth* obstinately, I think they would have done wrong, with respect both to their owners and themselves; I think the master had a right to discharge them under such circumstances of extreme pressure."

Here the contract of the seamen was not executory; it was in part performed. The time necessary to make the repairs had not elapsed. The delay had only been anticipated when the dismissal took place. It was the prospect that a long time must elapse before the ship was rendered fit for use, not the actual lapse of that time, which justified the captain in treating the adventure for which the crew contracted to serve as at an end and their contracts as terminated.

This case was cited in the case of *The Olympic* (1) and commented

(1) [1913] P. 92.

H. L. (E.) 1916 HORLOCK v. BEAL. Lord Atkinson.

upon by Buckley L.J., as he then was. In that case, as in the case of *The Elizabeth* (1) and as in the present case, the contract of the seamen was in part performed. The *Olympic*, though very seriously injured, was well worth repairing, but it was the prospect of the delay necessary to effect the repairs required to render her seaworthy which in the opinion of the Court rendered her a wreck within the meaning of the 158th section of the Act of 1894 and justified her owners in treating the particular adventure for which the crews contracted to serve as ended, and justified their dismissal.

In my view the provision touching wreck contained in the 158th section of the Merchant Shipping Act of 1894 is merely a statutory application of the principle first laid down in the case of *The Elizabeth* (1) to cases where the ship sustains physical injury, not so grave as to amount to loss, yet sufficiently serious to render her unseaworthy until repairs, requiring a substantial time to effect, are carried out upon her.

In the present case it does not appear that the ship is physically injured. Once interned by this enemy Power, the prospect of being interned for a length of time to which nobody can place a limit opened up to her owners. Moreover, any day something may be done which would transfer the property in the ship from them to her captors.

In *Beale* v. *Thompson* (2) Lord Ellenborough said: "Seizure, even hostile seizure, is not necessarily capture, though such is its usual and probable result. The ultimate act or adjudication of the State by which the seizure has been made assigns its proper and conclusive quality and denomination to its own original proceeding. If it condemn in such case it is a capture ab initio; if it award restitution as an act of justice, as the order of the 5th of June, 1801, expressly does, it pronounces upon its own act as not being a valid act of capture, but as an act of temporary seizure and detention upon grounds not warranting the condemnation of the property, or the dealing with it as captured. It seems to make no material difference for this purpose, whether the restitution were awarded by the Government of the country as an act of State, as in this case it was, or by any of the ordinary Courts of civil judicature to which the administration of justice on these subjects is usually delegated."

(1) 2 Dods. 403. (2) 4 East, 546, 561.

The meaning of that passage I take to be this, that seizure per se is an equivocal act, that whether it shall amount to capture or not depends upon the intention of the captor in making it, that this intention may be shown by acts subsequent, namely, either the condemnation in the proper judicial tribunals of the State of the property taken as lawful prize, or by an act of the Government of the country of the captors as an act of State, and that when that intention is shown it operates by relation back to the original seizure, turning it either into a capture ab initio, or into a temporary detention ab initio not amounting to capture. Thus the circular of June 5, 1801, was held to determine the character and purpose of the seizure made over six months previously.

In *Goss* v. *Withers* (1) Lord Mansfield deals with the principles adopted and practices followed by different European countries on this question of prize. He leaves the matter, in many respects, quite undecided. And, consistently with everything that has been laid down in these two authorities, it may well be that any act of the Government of a belligerent Power indicating that they have treated a seized ship as their own property, such as the sale of it, for instance, would be sufficient to determine the character and purpose of the original act of seizure so as to make it either a capture proper with all its consequences or mere detention.

We are deciding this case without knowing whether anything of the kind has occurred in this instance. The fact, however, that it might occur at any moment after seizure renders it all the more reasonable, just, and natural for the owners to have come to the conclusion, on August 4, 1914, that the adventure upon which their ship was embarked was put an end to, and the contracts of the crew and their right to wages determined. They acted upon that conclusion in the only way, and to the only extent possible under the circumstances, by refusing to pay the allotment. In reference to *Hadley* v. *Clarke* (2), it has been already pointed out that the embargo imposed by the Order in Council appeared only to contemplate a temporary detention, as it was made till "further order." And the point was never made that an embargo, even if originally intended to be temporary, might not put an end to the contract of affreightment if it were prolonged (see Lord Kenyon). All that

(1) 2 Burr. 683, 693—695. (2) 8 T. R. 259, 265, 267.

H. L. (E.) 1916 HORLOCK v. BEAL. Lord Atkinson.

was, in fact, decided was the abstract point that a *temporary* interruption of a voyage by an embargo does not put an end to such a contract.

Moreover, the judgments of Grose J. and Lawrence J., especially that of the latter, rather indicate that they treated the contract to carry the goods to Leghorn as a positive and absolute contract to do so within a reasonable time—the dangers of the seas only excepted. The latter learned Judge says they "absolutely engaged to carry the goods, 'the dangers of the seas only excepted'; that therefore is the only excuse which they can make for not performing the contract; if they had intended that they should be excused for any other cause, they should have introduced such an exception into their contract."

Of course, if the contract of the parties be thus positive and absolute, they are bound by it, however impossible the performance of it may become.

The contract with the crew in this case was not a positive and absolute contract, and the case does not appear to me to touch the present case.

Sect. 134 of the Act of 1894 does not, I think, touch this case. It obviously does not refer to the forcible act of an enemy.

No point was raised as to the two days which elapsed between August 2, the day of arrival, and August 4, the day of the outbreak of war.

In my opinion, therefore, the judgment of the Court of Appeal, as well as that of Rowlatt J., was erroneous and should be reversed and the appeal be allowed with costs here and below.

LORD SHAW OF DUNFERMLINE. My Lords, the respondent is the wife of a seaman who signed articles as second mate on board the *Coralie Horlock* on May 21, 1914. He agreed to serve "on a voyage of not exceeding two years' duration," within certain limits, "trading in any rotation and to end at such port in the United Kingdom or Continent of Europe (within home trade limits) as may be required by the master."

His wife, the respondent, was duly made allottee of one-half of his monthly wages. The papers are in order, and there is no question of her right to be paid the one-half of the wages which her husband

has earned or to which he is entitled. She founds upon s. 143 of the Act of 1894, conferring the right to sue and recover on allotment notes. By sub-s. 2 it is provided that the seaman shall be presumed to be duly earning his wages unless the contrary is shown, inter alia, by such "evidence as the Court in their absolute discretion consider sufficient to show satisfactorily that the seaman has ceased to be entitled to the wages."

The question in the case, accordingly, is whether Beal has become entitled to wages from and after the time when a state of war existed between Great Britain and Germany.

The declaration of war took effect as from 11 P.M. of August 4, 1914. The *Coralie Horlock* was then in the port of Hamburg, where she had arrived on the 2nd. The ship still remains there. Apart from exceptional or provisional rules or directions agreed to by the belligerent States, for her owners or master to trade with the enemy was, of course, illegal; for her crew it was equally illegal to assist in trading with the enemy; to attempt an escape, whether with or without cargo, may have been physically impossible; in any case it would have exposed the ship to the risk of destruction.

In *Esposito* v. *Bowden* (1) Willes J., reviewing the case law and referring especially to *Potts* v. *Bell* (2) and to the judgment of Lord Stowell in *The Hoop* (3), stated the law in terms which have never since been doubted: "It is now fully established that, the presumed object of war being as much to cripple the enemy's commerce as to capture his property, a declaration of war imports a prohibition of commercial intercourse and correspondence with the inhabitants of the enemy's country, and that such intercourse, except with the licence of the Crown, is illegal."

Without fault on the part of either party to the contract of service, law and force combined to stop the prosecution of this voyage; and the adventure was consequently lost. In my humble opinion that stoppage and loss, having arisen from a declaration of war, must be considered to have been caused for a period of indefinite duration, and so to have effected a solution of the contract arrangements for and dependent upon the completion or further continuance of the adventure.

(1) 7 E. & B. 763, 779. (2) (1800) 8 T. R. 548.
(3) (1799) 1 C. Rob. 196.

H. L. (E.) 1916 HORLOCK v. BEAL. Lord Shaw of Dunfermline.

I say this advisedly, in consequence of the argument presented to the House, and founded on the possibility that after a declaration of war peace may be concluded within a short time, ships may be released and voyages and shipping adventures be resumed. My Lords, as the cases show, such resumption does of consent take place, and Courts of law pay respect to the terms upon which the resumption was made. But, apart from the private arrangements of parties, the contracts are, in my opinion (and subject to the point as to a period of grace hereafter dealt with), brought to an end by a declaration of war, and all interested are entitled to have affairs settled upon that footing. And I am further of opinion that the contract of service between owners and crew is also terminated in the same way, because it is a contract whose incidents stand or fall with the adventure with which it was bound up.

I do not think that any other rule would be in accord with law, or would work. When a ship is put under detention by a declaration of war, I cannot see room for a condition of affairs which would leave parties in suspense, feeling that they are bound if the war be short but free if the war be long. In the case of a vessel in an enemy port, the war descends upon master and crew alike, taking no regard of either contract rights or obligations, but putting all alike on the common footing of British citizens, and as such placing their liberty completely at the disposal of the enemy Power. Germany made no lesser claim in the present case. From August 4 the owners "were deprived of the possession of this said vessel, and the said Tom Rea Beal, with the officers and other members of the crew, was on or about November 2nd removed from the said vessel to a lodging ship in Hamburg, and on or about the 8th November was interned at Ruhleben, near Berlin," where they still remain.

While the general question as to the effect of a declaration of war should, in my opinion, be resolved as stated, I should also feel entirely free to hold that the circumstances of the present case leave no doubt as to disruption of the contract relations of parties and the loss of the adventure.

Germany allowed no period of grace for loading or unloading, or for departure with freedom from capture or transit. The practice of nations in this particular has greatly varied. I refer with much

satisfaction to the treatment of this subject in Mr. Higgins' valuable work on the Hague Peace Conferences. On the outbreak of the Crimean war in 1854, enemy trading ships were allowed a period of six weeks, by Russia on the one hand and Britain and France on the other. In 1866 Prussia made the same allowance to Austria. Very liberal concessions on this head were made by the United States of America to the ships of Spain on the outbreak of war between those countries in 1898. Since that time the instances show less indulgence to peaceful commerce. On the occurrence of the Russo-Japanese war in 1904, Japan allowed a week, Russia forty-eight hours. In the present instance no allowance was made. The circumstances are specially notable. Great Britain was manifestly willing that the spirit of the Hague Convention should be obeyed and that days of grace should be allowed. On the day of the declaration of war, namely, August 4, 1914, an Order in Council was issued referring to the practice in the past and to the terms of the Convention. It provided that a period of grace for loading, unloading, and departure should be allowed to all German vessels in British ports, namely, until midnight of August 14. This was subject to information being received not later than the 7th, that "the treatment accorded to British merchant ships and their cargoes which, at the date of the outbreak of hostilities, were in the ports of the enemy, or which subsequently entered them, is not less favourable than the treatment accorded to enemy merchant ships" by the Order in Council. Germany did not accept this overture.

The uncertainties and hesitations of nations upon the question are reflected in art. 1 of the Hague Convention of 1907, in which the international consent was reduced to the mere proposition that "it is desirable" that a merchant ship in an enemy port should "be allowed to depart freely, either immediately or after a reasonable number of days' grace." As applied to the case of the *Coralie Horlock* at Hamburg the enunciation of this sentiment has proved worthless.

I observe, however, that art. 2 of the Convention is also founded on in the Courts below. It provides that such a ship "may not be confiscated. The belligerent may detain it, on condition of restoring it after the war, without payment of compensation, or he may requisition it on condition of paying compensation."

H. L. (E.) 1916 — HORLOCK v. BEAL. — Lord Shaw of Dunfermline.

My Lords, I am not in a position to say whether this head of the Hague Convention will be respected by the Government of Germany. The learned Swinfen Eady L.J. says that "in the absence of any evidence to the contrary it must be presumed that she is merely detained on condition of being restored after the war."

My Lords, it is not necessary, in the view which I take, to discuss the point at length. I have already referred to the action of Germany in regard to the subject of days of grace. Other circumstances might also have to be considered on the point of whether the Hague Convention afforded any presumptive aid in the construction of rights or obligations or in regard to the action of the present belligerents. Whether even—conventions having been disregarded—rights would have to be determined as in pre-convention days—the days, according to Lord Mansfield (2 Douglas, 614a), of confiscation "if no reciprocal agreement is made"— on such points no opinion need be indicated. But they do bear on the question of presumption from the terms of the Hague Convention, which is referred to in the Courts below.

I must express the gravest doubt whether any such presumption is in place in the present case. Speaking for myself, I should not feel justified upon the terms of this international Convention in allowing my mind to be swayed by such presumptions as would be appropriate to an inviolate document or to one which is backed by the sanctions of municipal law. What, in short, during the course of the war or under the stress of circumstances, may happen to this ship, no one can foresee: destruction, confiscation, or return—any of these things may occur; and all are involved in the overwhelming uncertainty both as to time and circumstance which follows from the present state of war. With regard to the effect of a declaration of war there is certainly, however, one presumption. It has been expressed in various decisions, but was clearly stated by Lush J. in *Geipel* v. *Smith* (1): "a state of war must be presumed to be likely to continue so long, and so to disturb the commerce of merchants, as to defeat and destroy the object of a commercial adventure like this."

The judgments of the Courts below proceed upon the two propositions: (1.) that the ship is in esse—she is neither wrecked nor lost;

(1) L. R. 7 Q. B. 404, 414.

and (2.) she is temporarily detained, and therefore that the principle of the old embargo cases applies. I again take leave to refer to this second point. My Lords, an analysis of the embargo cases shows that they depended largely if not altogether on these considerations. In the first place, in the working of the old rule that freight is the mother of wages, the question as to whether wages were due could not be adjusted until after the voyage was over and the freight was earned. Accordingly, in the leading case of *Beale* v. *Thompson* (1), the essential fact founded on was this, that after an embargo laid on by the Tsar Paul had been taken off by that erratic Sovereign the voyage was resumed, the same ship and the same men employed, and all the men taken on to complete the same voyage, under circumstances which showed "recognition on the part of the master that he and the sailors then stood in their original relative situation to each other under the articles by which that relation was constituted." (2) The rule as to the dependency of wages on freight has long ago been abolished by statute; and while, of course, it might be possible under special bargain to continue or resume contract relations upon special terms, I have great doubt whether the embargo cases to which I have referred can be now relied upon in support of any part of the modern law of seaman's wages. These observations apply in terms to other cases cited, e.g., to *Delamainer*. (3)

Upon, however, the proposition that the ship is neither wrecked nor lost, I agree with the learned judges in the Courts below. On the other hand, I cannot see my way to hold that there is therefore an indefeasible right to recover, under s. 158 of the Act, unless and until such wreck or loss occurs. I venture respectfully upon that subject to adopt the judgment of my noble and learned friend Lord Wrenbury.

I now come, accordingly, my Lords, to what is by far the most important point in the case. Granted that a state of war exists, with consequences which include the stoppage of the voyage and the internment of officers and crew, are wages due for a period subsequent to the declaration of war, the ship itself having been neither wrecked nor lost, and being still in the port of Hamburg?

(1) 4 East, 546. (2) 4 East, 565.
(3) 4 Camp. 186.

H. L. (E.) 1916 HORLOCK v. BEAL. Lord Shaw of Dunfermline.

It may be conceded that the continued existence of the subject-matter of the contract has formed a large part in the consideration of such a question. Under the law of Rome the illustration of the solution of a contract obligation was frequently given from the case of a promise with regard to a slave. In such a case, if the slave died or was manumitted before being handed over, the contract was at an end. The vendor, however, remained, of course, answerable if he was responsible for what had occurred—if he had himself killed the slave or set him free. In all cases, however, where no fault attached, the failure of the corpus certum released the contracting parties.

Several of the citations from the Digest on this subject are made by Blackburn J. in the leading case of *Taylor* v. *Caldwell* (1), and one can entirely assent to that very learned judge's view that the principle is adopted in the civil law as applicable to every obligation of which the subject is a thing certain. He cites Pothier in support of a definition of much precision as follows: "The debtor corporis certi is freed from his obligation when the thing has perished, neither by his act, nor his neglect, and before he is in default, unless by some stipulation he has taken on himself the risk of the particular misfortune which has occurred."

In another passage of this judgment Blackburn J. remarks: "In none of these cases is the promise in words other than positive, nor is there any express stipulation that the destruction of the person or thing shall excuse the performance; but that excuse is by law implied, because from the nature of the contract it is apparent that the parties contracted on the basis of the continued existence of the particular person or chattel."

In the course of laying down these principles the cases which had occurred in the English Courts were referred to, and that of *Williams* v. *Lloyd* (2) was especially founded on.

It is manifest that the principle last adumbrated was capable of a wider practical and logical application than to the failure of a certum corpus. The underlying ratio is the failure of something which was at the basis of the contract in the mind and intention of the contracting parties.

This ratio has, I am humbly of opinion, been properly developed

(1) 3 B. & S. 826, 835, 839. (2) (1628) W. Jo. 179.

in recent years. I do not go through all the decisions, but I think it right to mention that of *Krell* (1), in which I desire to attach my respectful and pointed concurrence in the opinion delivered by Vaughan Williams L.J. in these passages: "Whatever may have been the limits of the Roman law, the case of *Nickoll* v. *Ashton* (2) makes it plain that the English law applies the principle not only to cases where the performance of the contract becomes impossible by the cessation of existence of the thing which is the subject-matter of the contract, but also to cases where the event which renders the contract incapable of performance is the cessation or non-existence of an express condition or state of things going to the root of the contract."

This view is fully discussed by the learned judge. I think it to be in entire accord with that doctrine of frustration of voyage which has become fully accepted since the case of *Jackson* v. *Union Marine Insurance Co.* (3), with the doctrine underlying *Taylor* v. *Caldwell* (4), and with sound legal principle.

Blackburn J., in discussing the civil law, only cited Digest 45, 1, 33 and Digest 45, 1, 23, and confined his survey of that law to the failure of a corpus certum, developing the doctrine as it were from that point. And Vaughan Williams L.J. reasons upon the same limited premises, stating that "the Roman law dealt with obligationes de certo corpore." The passages cited are from the book "de verborum obligationibus." The subject is too large for treatment here, but it may be said that the same principle appears in book 18, "de contrahenda emptione." Even in regard to book 45, however, another text shows that the development and wider application of the principle was not unknown to Roman jurists and was approved. It is Digest 45, 1, 91. After dealing with the case of a slave, the ordinary illustration of a certum corpus, and of his death, the review of the principle is broadened thus: "Si sit quidem res in rebus humanis, sed dari non possit, ut fundus religiosus, puta, vel sacer factus, vel servus manumissus, vel etiam ab hostibus si capiatur"—then in each of these instances liability under the obligation flies off, if the occurrences do not arise from the promisor's fault. Mr. Hunter in his invaluable work thus paraphrases the

(1) [1903] 2 K. B. 740, 748.
(2) [1901] 2 K. B. 126.
(3) L. R. 10 C. P. 125.
(4) 3 B. & S. 826.

H. L. (E.) 1916 HORLOCK v. BEAL. Lord Shaw of Dunfermline.

dictum as to the sale of a piece of land (1): "Sempronius promises to give a small plot of ground to Maevius. After doing so, he buries a dead body in the place, and thus makes the land extra-commercium. Sempronius must pay its value. *If the land had belonged to another, who had buried a body in it, he would have been released.*"

The illustration is not inapt even to the present case, for it shows that it was no answer to say "the land, the certum corpus, is there," for the land having through no fault of the promisor become extra commercium, by burial of the dead, then the basis of the transaction, the root of the contract as that had been contemplated by the parties, had gone, or had suffered such an alteration as to release them from the obligation itself. This was a case analogous to that of the slave who was still alive but had been manumitted or had been captured by the enemy. It is thus not without interest to observe that not only had the principle been laid down, but its modern development had been foreshadowed in Roman times.

The application of the principle in the present case can, in my opinion, lead to only one result, namely, that a dissolution of the relation of master and servant occurred in the case of the *Coralie Horlock* upon the declaration of war between Germany and Britain. The vessel being then in the port of Hamburg, remains there; her master, officers, and crew are interned as prisoners: the voyage and adventure contemplated have been brought to an end. No light is thrown upon the question by illustrations of contracts of service which have been terminated, say, by a bankruptcy or a cessation of business: in such cases the servant, having lost his employment, is able to say, "I am here, willing and able to render the service contracted for." In the present case these ideas would be fictional: the ship cannot be navigated, no orders in that regard by the master could be obeyed, and the crew, unhappily, is prevented by hostile force from rendering the ship any service whatsoever. In such circumstances I do not see my way to hold the seaman to be entitled in law to wages which, through no fault of the owners, he is entirely unable to earn by service. Such cases, no doubt, will take their rank among the many desolating circumstances which demand remedial attention at the hand of Parliament or the Executive power.

I think that the appeal should succeed.

(1) Roman Law, p. 638.

LORD PARMOOR. My Lords, in this appeal, involving a question of great general importance, I agree with the decision of Rowlatt J. and of the majority in the Court of Appeal.

The plaintiff in the action and the respondent in the appeal is the wife of Tom Rea Beal, who signed articles as second mate on board the *Coralie Horlock* on May 21, 1914. On the same day an allotment note was duly signed in favour of the respondent for the sum of 4*l.* 15*s.* to be paid monthly by the appellant during the period of the articles. On August 4, 1914, at the outbreak of the war, the *Coralie Horlock* was in the port of Hamburg, and was then, and still is, unable to leave by reason of detention by the German authorities. The appellant paid to the respondent, under the allotment note, certain sums up to August 2, 1914, but contends that he is not liable to pay to Tom Rea Beal any wages after August 4, 1914, and in consequence is not liable to make any further payment to the respondent.

The case was tried on an agreed statement of facts. The contract of service as a mariner by Beal was, "on a voyage of not exceeding two years' duration to any ports or places within the limits of 75 degrees north and 60 degrees south latitude, commencing at Hull, proceeding thence to Alexandria, and/or any other ports within the above limits; trading in any rotation and to end at such port in the United Kingdom or Continent of Europe (within home trade limits) as may be required by the master." The decision of the appeal depends upon the construction of this contract.

The material facts are contained in paragraphs 7 and 8 of the statement: "On and after the 4th August, 1914, a state of war existed between the United Kingdom of Great Britain and Ireland and the Empire of Germany. The said vessel was then and still is in the port of Hamburg, and is unable to leave the said port by reason of detention by the German authorities. The appellant has been since the 4th of August, 1914, and still is, deprived of the possession of his said vessel, and the said Tom Rea Beal, with the officers and other members of the crew, was on or about November 2nd removed from the said vessel to a lodging ship in Hamburg, and on or about the 8th November was interned at Ruhleben, near Berlin."

It is not allowable to make conjectures in favour of the appellant outside the facts contained in the statement and any inferences

H. L. (E.) 1916 HORLOCK v. BEAL. Lord Parmoor.

deducible therefrom. I agree in this respect with the views expressed in the judgments of Rowlatt J. and Bankes L.J.

In the course of the argument, arts. 1 and 2 of the Hague Convention, No. 6 of 1907, were referred to. They are as follows :

"When a merchant ship belonging to one of the belligerent Powers is at the commencement of hostilities in an enemy port, it is desirable that it should be allowed to depart freely, either immediately or after a number of days' grace, and to proceed, after being furnished with a pass, direct to its port of destination or any port indicated to it. The same principle applies in the case of a ship which has left its last port of departure before the commencement of the war and has entered a port belonging to the enemy while still ignorant that hostilities have broken out."

Then art. 2 :—

"A merchant ship which, owing to circumstances beyond its control, may have been unable to leave the enemy port within the period contemplated in the preceding article, or which was not allowed to leave, may not be confiscated. The belligerent may merely detain it on condition of restoring it after the war without payment of compensation, or he may requisition it on condition of paying compensation."

The case appears to have been argued on the footing that the vessel was detained in accordance with the conditions of these articles. These articles could not be referred to if they contained provisions inconsistent with the agreed statement of facts, but I think that they are in accord with the said statement, and that there is no objection to the reference which has been made to them in the judgments of the Courts below.

The respondent has proved, pursuant to s. 143, sub-s. 2, of the Merchant Shipping Act, 1894, that she is the person mentioned in the allotment note, and that the note was given by the owner or by the master or some other authorized agent. Her husband, therefore, is to be presumed to be duly earning his wages, unless the contrary is shown under sub-s. 2 (*d*) : "by such other evidence as the Court in their absolute discretion consider sufficient to show satisfactorily that the seaman has ceased to be entitled to the wages out of which the allotment is to be paid." The question is whether this onus has been discharged. The writ was issued on April 10,

1915, and judgment has been given in favour of the respondent for the amount of the allotment note up to the date of the writ. It is important that this limitation should be observed. My opinion is based on the conditions as they then existed, namely, a detention which had operated from August 4, 1914, to April 10, 1915, and of which the subsequent length was indeterminate and not capable of exact definition.

The first question to be decided is whether, under the conditions stated in the agreed statement of facts, the matter is determined by statutory enactment. It is not suggested that Tom Rea Beal has been discharged abroad under the provisions of the Merchant Shipping Act, 1906, or that his right to wages has been suspended under the Merchant Shipping Act of 1894. The relevant section is s. 158, which enacts that where the services of a seaman terminate before the date contemplated in the agreement by reason of the wreck or loss of the ship, or of his being left on shore at any place abroad under a certificate granted as provided by that Act of his unfitness or inability to proceed on the voyage, the seaman shall be entitled to wages up to the time of such termination, but not for any longer period. If there has been a loss of the ship within the meaning of this section the appellant is not liable.

It is not necessary to attempt to define exhaustively all the cases which might be included within the term "loss of the ship," but in my opinion it does not include such a case as that of the *Coralie Horlock*, of the possession of which the appellant has been deprived since August 4, 1914, by reason of its detention in the port of Hamburg. The ship has not been lost by any physical accident, such as might have caused a wreck, and there is no evidence that it has been requisitioned by the German authorities, or that there has been any confiscation of ownership. The use of the vessel has been lost for an indeterminate time. I doubt whether the loss of the use of a vessel comes in any sense within the words "loss of the ship" in s. 158 of the Act of 1894. It is not necessary to decide this point. There is no finding in the agreed statement of facts which could justify the inference that, owing to its detention, the ship has no longer a commercial value, or that the expense incurred, or to be incurred, in not abandoning her is such that no man as a matter of business would incur the outlay.

H. L. (E.) 1916 HORLOCK v. BEAL. Lord Parmoor.

I am in agreement with Rowlatt J. (1): "Now what I have stated with regard to the position of the ship in Hamburg under the Hague Convention, if it is right, negatives any question of the loss of the ship. She is there; the property in her has not changed; she is simply detained; and, apart altogether from what was said in the case of *Sivewright* v. *Allen* (2), it is impossible to hold that this ship is lost." It was argued on behalf of the appellant that, although s. 158 was not exhaustive of the cases in which a seaman was entitled to wages up to a given time, but not for any longer period, yet the section did cover, and was intended to cover, a case such as the present, in which if the seaman is no longer entitled to his wages it is by reason of the alleged loss of the ship. My Lords, I think that there is good reason for this contention, but I prefer to place my opinion on wider grounds. Assuming that s. 158 has no application, Tom Rea Beal was, in my opinion, entitled to the payment of his wages up to the date of the issue of the writ on the construction of the contract of service, and the respondent succeeds in her claim as allottee.

The articles, which contain the contract of service, make no express reference to the contingency which has happened, and which is said to have dissolved the contract and to have defeated any claim to wages.

The detention of the vessel and the imprisonment of the mariners did render it impossible in fact for Tom Rea Beal to perform the duties of his service as a mariner, but this condition was not brought about by any default on his part, and there is no suggestion of disobedience to any command or of any refusal on his part to do his duty. Whether under such circumstances the contract is dissolved, or a claim to wages under the contract is defeated, depends on the bargain of the parties as expressed or implied in the contract which they have made. If the events which have happened subsequent to the date of the contract, and which operate to make its performance no longer possible, are of such a nature and character that they can reasonably be supposed to have been within the contemplation of the contracting parties at the time when the contract was made, then the subsequent contingency does not dissolve the contract, or release either party from a continuing liability under the contract.

(1) [1915] 3 K. B. 208. (2) [1906] 2 K. B. 81.

Even though the general liability under the contract continues, the claim of a plaintiff may be defeated by proof of non-compliance with any one or more of the special contract stipulations. An illustration arises in the leading case of *Beale* v. *Thompson*. (1) One of the arguments urged on behalf of the defendant in that case was that the articles contained a special stipulation against mariners going on shore, under any pretence, before the voyage was ended, without the leave of the commanding officer on board, and that the plaintiff had gone on shore in contravention of this stipulation. Lord Ellenborough having found that the freight had been earned, and that the contract had not been dissolved, says "that the only remaining question necessary to be decided in order to perfect the plaintiff's claim to have his wages paid out of that fund (i.e., freight) is, Has his service as a mariner under his articles been duly performed by him ?" The special verdict of the jury had found that the plaintiff did his duty as a seaman during the voyage, but it was said that the facts stated in the special verdict showed that during a considerable period of the time, for which the wages were claimed, the master was out of possession of the vessel, and the crew were all marched up the country and detained as prisoners.

Lord Ellenborough held that the stipulation in the articles that the plaintiff should not be on shore under any pretence, before the voyage was ended, without the leave of his commanding officer on board, did not apply to a case of imprisonment, and must be understood as being on shore by the party's own unauthorized act. In the present case there is no question of the breach of a special stipulation in the articles, such as would defeat the claim to wages, if the contract is not dissolved. It was further held in *Beale* v. *Thompson* (1) that if the imprisonment on shore could be considered as a breach of the stipulations in the articles, such breach had been remedied by the subsequent action of the master, but this alternative finding does not affect the principle of the decision, and is not applicable in the present case.

The question, therefore, to be determined is whether the detention of the vessel and the imprisonment of the mariners have dissolved the contract of service. The general rule of the common law is that a contract is not dissolved, or the parties excused from their

(1) 4 East, 546.

H. L. (E.) 1916 HORLOCK v. BEAL. Lord Parmoor.

obligations, in cases in which the performance has become impossible owing to conditions which have only become operative subsequent to the contract date. The object of this rule of construction is to give effect to the intention of the contracting parties as expressed in their contract, and it is not applicable if a contrary intention is expressed or implied in a particular contract. In a mariner's contract for wages it has been held in a decision confirmed in this House—*Beale* v. *Thompson* (1)—that the hostile detention of the vessel and the internment of the crew do not of themselves dissolve the contract of service, and this decision appears to have been uniformly recognized.

In *Beale* v. *Thompson* (1) the vessel was detained by hostile seizure for a period of about six months and then released. The voyage was continued, and the freight had been specifically earned and received by the owners of the vessel. At this date the doctrine that freight was the mother of wages prevailed, and it was necessary that freight should be earned before a claim to wages could be made good. This condition having been fulfilled, it became necessary to decide whether the detention of the vessel and the imprisonment of the mariners dissolved the contract of service on which the seaman relied for his claim. Lord Ellenborough, in his judgment, draws a distinction between detention and capture, and holds that detention, as distinguished from capture, did not defeat the plaintiff's claim to wages. It should be noted that this decision was given in reference to a detention which had lasted for a period of about six months and had terminated ; but if the detention of the vessel and the imprisonment of the mariners had of themselves operated to dissolve the contract, such contract would have been dissolved as at the date of the commencement of the detention and imprisonment, and there would have been a severance between such contract and any contract subsequently entered into by the master when the vessel was released. This decision was brought before this House by writ of error and confirmed. The Journals of this House contain the order made : " That the said judgment be in all things affirmed, and that it stand in full force and virtue notwithstanding the causes and matters aforesaid as above assigned in error."

I am unable to draw any material distinction between the relevant

(1) 4 East, 546; 1 Dow, 299.

facts in the case of *Beale* v. *Thompson* (1) and the agreed facts of this case. In *Beale* v. *Thompson* (1) the vessel was unable to leave the port and continue her voyage by reason of hostile detention by the Russian authorities, and in this case by reason of hostile detention by the German authorities. In each case there is a hostile seizure, which Lord Ellenborough distinguishes from capture. In *Beale* v. *Thompson* (1) the mariners were removed from the ship and imprisoned on land; in the present case the crew were first removed to a lodging ship at Hamburg, and subsequently, on or about November 8, were interned at Ruhleben, near Berlin.

The earlier case of *Pratt* v. *Cuff* (2) is referred to in *Thompson* v. *Rowcroft*. (3) In this case a vessel was captured by the Dutch and carried to Delfziel. The plaintiff was confined on board ship for seven months and subsequently in Haerlingen Prison until January 23 in the following year, when the vessel and plaintiff were released. The jury found in favour of the plaintiff for wages during the period of his imprisonment, subject to the opinion of the Court. At a subsequent trial the jury found that the freight had been received by the defendant. Lord Kenyon is said to have expressed so strong an opinion for the plaintiff that the case was never afterwards pressed by the defendant.

In *Hadley* v. *Clarke* (4) the defendants had contracted to carry goods from Liverpool to Leghorn. On the arrival of the vessel at Falmouth an embargo was laid on her for an indeterminate period, "until the further Order of Council." It was held that even after two years, when the embargo was taken off, the defendants were answerable in damages for the non-performance of the contract. The report shows that it was argued on behalf of the defendants that the case was within the rule that when a contract which was possible and legal at the time of making it becomes afterwards impossible by the act of God, or illegal by an instrument of the State, the obligation is discharged. This argument was not accepted by the Court as referable to a contract of this character and Lord Kenyon bases his judgment on the general proposition "that a temporary interruption of a voyage by an embargo does not put an end to such a contract as this." Lord Kenyon further

(1) 4 East, 546.
(2) Cited in 4 East, 43.
(3) (1803) 4 East, 34.
(4) 8 T. R. 259.

H. L. (E.) 1916 HORLOCK v. BEAL. Lord Parmoor.

expresses the opinion that no line can be drawn dependent on the duration of the embargo ; but it is not necessary to indorse so wide a proposition in the present instance. This decision was given on a contract of carriage, and not on a contract of service, but the principle and reasoning are equally applicable to a contract of service.

This case was referred to both in the judgment of Bramwell B. and in the dissentient judgment of Cleasby B. in the case of *Jackson* v. *Union Marine Insurance Co.* (1), but its authority is not impugned. In the judgment of Bramwell B. it is said, " It may safely be said that there the question was wholly different from the present." Cleasby B. quotes with approval a passage from the judgment of Bovill C.J. in the Court below : " I have no difficulty in subscribing to the doctrine laid down in *Hadley* v. *Clarke* (2), that a common embargo does not put an end to any contract between the parties, but is to be considered as a temporary suspension of the contract only, and that the parties must submit to whatever inconvenience may arise therefrom, unless they have provided against it by the terms of their contract. . . . . The principle of *Hadley* v. *Clarke* (2) is, that an embargo is a circumstance against which it is equally competent for the parties to provide as against the dangers of the seas, and, therefore, if they do not provide against it, they must abide by the consequences of their contract."

In the case of *Delamainer* v. *Winteringham* (3) the plaintiff claimed to receive wages during a hostile embargo in a foreign port, while he was imprisoned on shore on proof—which was then necessary—that the voyage had been completed and the freight earned. Objection was taken that the nature of the embargo had not been proved. Lord Ellenborough, however, gave judgment for the plaintiff, presuming the fact that the embargo was not of such a nature as to put an end to the contract between the master and owners of the ship and the mariner, and finding that there was no severance of service.

My Lords, I am unable to find any case in conflict with the principle laid down by Lord Ellenborough and confirmed in this House in the case of *Beale* v. *Thompson* (4), but I have not overlooked the cases quoted in the argument before your Lordships.

(1) L. R. 10 C. P. 125, 135, 146.
(2) 8 T. R. 259, 266.
(3) 4 Camp. 186.
(4) 4 East, 546 ; 1 Dow, 299.

In the case of *Melville* v. *De Wolf* (1) it was held that where a seaman had been sent home as a witness against his captain on a trial for shooting one of the crew, there was a complete dissolution of the contract of service, and no claim for wages could be maintained. In this case, however, a distinction was drawn between such a dissolution of the contract of service and a temporary detention. Lord Campbell, in his judgment, expressly approves *Beale* v. *Thompson* (2): "We are certainly bound by the case of *Beale* v. *Thompson* (2) . . . . we entirely approve of that decision; for there nothing had occurred to dissolve the contract; and the relation constituted between the parties when the ship's articles were signed might well be considered as enduring till the return of the ship to England. The ship was only detained under an embargo, which in its nature is only a temporary act; and it might have been removed at any time from day to day."

In the case of *The Friends* (3) Sir W. Scott says in his judgment: "Nothing can be better settled, than that the act of capture defeats all rights and interests; but it is contended, that the former interest revives upon the recapture." In the case of *The Governor Raffles* (4) Sir W. Scott says: "The moment the capture is effected by an enemy the crew are discharged from their duty to their employers." It is not necessary, however, to refer to further cases of a similar character, since, whatever may be the result of a hostile capture, Lord Ellenborough in *Beale* v. *Thompson* (2) draws the distinction between the case of capture and the case of detention.

My Lords, the opinion above expressed finds strong confirmation in a passage from the judgment of Kennedy L.J. in *The Olympic* case (5), which is quoted in the judgment of Swinfen Eady L.J. "The embargo which prevents a laden ship from proceeding from port on her voyage does not dissolve the mariner's engagement, any more than it dissolves the contract between the shipowner and the merchant whose cargo has been loaded." Kennedy L.J. then refers to a passage in Lord Tenterden's Law of Merchant Ships and Seamen, and says: "In this sentence one of the greatest of judicial authorities on matters of shipping clearly indicates his opinion

(1) 4 E. & B. 844, 849.
(2) 4 East, 546; 1 Dow, 299.
(3) 4 C. Rob. 143, 144.
(4) 2 Dods. 14, 17.
(5) [1913] P. 92, 111.

H. L. (E.) 1916 HORLOCK v. BEAL. Lord Parmoor.

even in the case of the embargo of a laden ship—i.e., in the case of an obstacle to the prosecution of the voyage imposed by the Government, an obstacle of indefinite and unascertainable duration (which the detention for repairs is not) —that, while, in his own interest and in order to save himself the risk of expense, it may be a reasonable and indeed very prudent step on the part of the shipowner to discharge the greater part of the crew, yet, if that step is taken, the shipowner must compensate those whom he so discharges for the loss of the wages during the unfulfilled residue of the contract period, unless, as is likely enough, they find equally remunerative employment in another ship," and adds, " that what is true of an embargo by the Government to which the ship belongs is true also of seizure for a temporary purpose by a hostile Power."

My Lords, I think that the claim of the allottee is good, and that, up to the date of issue of the writ, there was no severance of service under the contract, and that the judgment of the Court of Appeal should be affirmed.

LORD WRENBURY. My Lords, the respondent is entitled to one-half her husband's wages if any. The question for decision is whether after August 4, 1914, or some later date, the husband is entitled to wages. The appellant denies that he is entitled to wages after August 4, 1914. He founds himself upon either s. 158 of the Mercantile Shipping Act, 1894, or upon the common law or the law merchant as applicable to the case of a seaman if, as he contends, the statute has not rendered that law inapplicable.

I may dispose of the question upon s. 158 in few words. It was decided in *The Olympic* (1) that there is a " wreck of the ship " within the section where the vessel has suffered such physical damage by a casualty in the nature of wreck as that she has ceased to be in a seaworthy condition to continue within a reasonable time the adventure as a commercial adventure. The same, I think, is true of the word " loss " in the section. If there have been such a loss as that the adventure has failed as a commercial adventure the section, I think, applies.

But it remains to determine the meaning of the word " loss." It is confined, I think, to physical loss. The wreck and the loss referred to in the section I understand to be a physical injury if it be a wreck

(1) [1913] P. 92.

and a physical loss if it be a loss. Upon the evidence in this case the ship was at Hamburg on August 4. She was still there on November 2; there is no evidence as to what has happened to her since. She may be there, she may not. She may be in existence, she may not. She has not, so far as appears, been confiscated. If Germany has obeyed the Hague Convention she will not have been confiscated. I make no assumption that Germany will have obeyed the Hague Convention. It suffices to say that the appellant has not proved confiscation. The result is that the appellant has proved not that the ship has been physically destroyed, or injured, nor that the property in the ship has been taken from him, but only that from August 4, 1914, to the present time he has been deprived of the use of her.

In my judgment detention or deprivation of use is not loss within s. 158. It follows that in my opinion s. 158 does not apply. So far I think the respondent is right.

The respondent next began by contending that s. 158 is exhaustive; that if that section offers no defence the seaman is entitled to his wages. This seems to me an impossible contention. When a statute provides that in certain events a certain result shall ensue, it is plainly not enacting what is to result in other events. The contention was then modified, and was that the section is exhaustive in the cases with which it deals. This may be, and I think is true, but it leaves the matter where it was. Upon my view of the word "loss" the section does not deal with the case before the House. It follows that the section does not exclude the common law or the law merchant in the case of seamen.

Where a contract has been entered into, and by a supervening cause beyond the control of either party its performance has become impossible, I take the law to be as follows: If a party has expressly contracted to do a lawful act, come what will—if, in other words, he has taken upon himself the risk of such a supervening cause—he is liable if it occurs, because by the very hypothesis he has contracted to be liable. But if he has not expressly so contracted, and from the nature of the contract it appears that the parties from the first must have known that its fulfilment would become impossible if such a supervening cause occurred, then upon such a cause occurring both parties are excused from performance. In that case a condition is implied that if performance becomes

H. L. (E.) 1916 HORLOCK v. BEAL. Lord Wrenbury.

impossible the contract shall not remain binding. The leading case on the subject is *Taylor* v. *Caldwell*. (1) *Krell* v. *Henry* (2) is an illustration of the application of the principle.

On August 4, 1914, there occurred, in the case of this ship, a supervening cause which resulted in the impossibility of continuing that adventure which was the subject of the seaman's contract of May 21, 1914, and that impossibility has continued for such a time as that its character, which might have proved to be temporary, is now known to be for a time so indefinite and so long that the adventure which was the whole basis of the contract has failed. The case falls, I think, within the principle of *Taylor* v. *Caldwell*. (1) *Melville* v. *De Wolf* (3) is a like case. The plaintiff there was taken from his employment and sent home by the order of a Court, and, as Lord Campbell C.J. put it, the contract was "dissolved by the supreme authority of the State." The plaintiff was not entitled to wages from the date when he was taken away and his service ceased.

The respondent's counsel was, I think, not prepared to contend that if this had been the case, not of a mariner but of a commercial traveller, subsequent wages could have been claimed. But the case of the mariner, he contends, stands in a different position. *Chandler* v. *Grieves* (4) was a case of a seaman disabled by accident while on board, who was held entitled, nevertheless, to payment of his wages for the whole voyage. The case establishes very little for the present purpose. Sect. 160 of the Act of 1894 seems to assume —and, I think, to assume rightly—that a seaman incapable by illness to perform his duty is nevertheless entitled to his wages during the continuance of the adventure in which, by the terms of his employment, he took part.

On the other hand *The Friends* (5) is authority that when the ship is captured and the seaman taken from the vessel his wages cease, and that even if the ship be recaptured his case is not bettered if he has been taken from the vessel and renders no service after the recapture. *Wiggins* v. *Ingleton* (6), which was the case of a seaman taken by the press gang, and *The Governor Raffles* (7), where the ship had been taken by mutineers, are authorities to the same

(1) 3 B. & S. 826.
(2) [1903] 2 K. B. 740.
(3) 4 E. & B. 844, 849.
(4) 2 H. Bl. 606, n.
(5) 4 C. Rob. 143.
(6) 2 Ld. Raym. 1211.
(7) 2 Dods. 14, 17.

effect, although the latter is in point only for the dictum of Sir William Scott that " the moment capture is effected the crew are discharged from their duty to their employers. The contract between the parties is at an end."

Reverting to the statute, the respondent relies on s. 134. I fail to see that the section helps her. Sect. 134 (*a*) speaks of the event that the seaman " lawfully leaves the ship at the end of his engagement." These words do not cover the event of the seaman being forcibly removed by the enemy from his employment and from the ship. Sect. 134 (*c*) provides that the seaman's wages shall continue to run unless the delay to make payment of his wages is due " to any other cause not being the wrongful act or default of the owner or master." The cause here was an extraneous and supervening cause, and was not any wrongful act or default of the owner or master.

Then s. 143 is cited. By that section it is provided in favour of the allottee of wages that " the seaman shall be presumed to be duly earning his wages, unless the contrary is shown to the satisfaction of the Court either— . . . . (*d*) by such other evidence as the Court in their absolute discretion consider sufficient to show satisfactorily that the seaman has ceased to be entitled to the wages out of which the allotment is to be paid." This simply throws the onus of proof on the employer.

Beale v. *Thompson* (1) was a case decided when the doctrine prevailed that " freight is the mother of wages," a doctrine which has been brought to an end by statute (see 7 & 8 Vict. c. 112, s. 17 ; Merchant Shipping Act, 1854, s. 183 ; and now s. 157 of the Merchant Shipping Act, 1894), and it was a case in which the seaman, after the detention of the vessel was over, took part in her voyage home. The decision involves no more than this, that if the adventure is ultimately carried to a conclusion the seaman is entitled to his wages for the whole period. *Delamainer* v. *Winteringham* (2) is similar.

In *Hadley* v. *Clarke* (3) there was no finding that the adventure had been frustrated. For the purpose of the decision I may take it that the plaintiff did not care when his goods reached Leghorn so long as they got there. The defendants contracted to take them there and failed to do so. The plaintiff, therefore, recovered damages.

(1) 4 East, 546 ; 1 Dow, 299. (2) 4 Camp. 186.
(3) 8 T. R. 259.

H. L. (E.) 1916 HORLOCK v. BEAL. Lord Wrenbury.

In *Jackson* v. *Union Marine Insurance Co.* (1) Bramwell B. points out the grounds upon which the decision can be supported. It is, I think, no authority for the general proposition, that a contract of marine adventure remains binding when a supervening cause has rendered it impossible to perform it within such a time as that the adventure can be fulfilled as a commercial adventure.

When this vessel was detained at Hamburg on August 4 the owner was deprived, and he has ever since remained deprived, of the use of her. On August 5, if her current charter had been at an end, he could not have offered her to a new charterer, for he could not have ensured that he could deliver possession of her under the charter, and events have shown that in fact he could not have done so. The contract with the seaman for employment on the ship for not exceeding two years from May 21, 1914, was a contract which the owner from no fault of his own was unable to fulfil. As from August 4 the adventure had become impossible and the contract, in my judgment, ceased to be binding. It is unnecessary, therefore, to consider the later date of November 2, when the seaman was removed from the vessel to another vessel for detention, or that of November 8, when he was removed to Ruhleben. If anything more was wanted, I think it clear that the seaman (for no fault of his own it is true) was at those dates taken by superior authority from the place of his employment and from the possibility of performing his service. *Melville* v. *De Wolf* (2) is authority against his claim as from those dates.

My Lords, from what I have said it follows that I cannot agree with the learned judge who tried the case or with the majority in the Court of Appeal. In my judgment this appeal must be allowed.

Order of the Court of Appeal reversed and judgment entered for the appellant. The respondent to pay the costs in the Court of Appeal and also the costs of the appeal to this House.

Lords' Journals, January 21, 1916.

Solicitors for appellant: *Holman, Birdwood & Co.*

Solicitors for respondent: *Ellis Davies, Roberts & Co., for Miller, Taylor & Holmes, Liverpool.*

(1) L. R. 10 C. P. 125, 146. (2) 4 E. & B. 844.

[PRIVY COUNCIL.]

ONTARIO POWER COMPANY OF NIAGARA FALLS . . . . . } APPELLANTS;

AND

MUNICIPAL CORPORATION OF STAMFORD RESPONDENTS.

J. C.* 1916 *Feb.* 2.

ON APPEAL FROM THE SUPREME COURT OF ONTARIO, APPELLATE DIVISION.

Canada (Ontario)—Assessment—School Rates—Municipal By-law—Exemption—Confirming Statute—Construction of Statute—Public Schools Act, 1892 (55 *Vict. c.* 60, *Ontario*), *s.* 4.

By the Public Schools Act, 1892 (Ontario), s. 4, "No municipal by-law hereafter passed for exempting any portion of the rateable property of a municipality from taxation, in whole or in part, shall be held or construed to exempt such property from school rates of any kind whatsoever." In 1904 the respondents passed a by-law fixing the assessment of the appellants' property at 100,000 dollars for the next twenty years. This by-law required statutory confirmation, since it had not received the assent of two-thirds of the voters, as provided by the Consolidated Municipal Act, 1903, s. 591a. By an Act of the Ontario Legislature the by-law was "declared to be legal, valid and binding notwithstanding anything in any Act to the contrary":—

Held, that the confirming Act gave statutory effect to the by-law subject to the construction imposed upon it by the Public Schools Act, 1892, and that the property could be assessed at over 100,000 dollars in respect of school rates.

APPEAL from a judgment of the Supreme Court of Ontario, Appellate Division (March 29, 1915), affirming the judgment of Falconbridge C.J. at the trial.

The action was brought by the respondents in the Supreme Court of Ontario to recover from the appellants the general and school rates payable upon their property in the municipality upon an assessment for the year 1914. The said assessment was at 100,000 dollars for general rates and at 900,000 dollars for school rates.

By a by-law passed by the respondents in 1904 the assessment of the appellants' property had been fixed at 100,000 dollars for

* *Present*: LORD BUCKMASTER L.C., VISCOUNT HALDANE, and LORD SUMNER.

J. C.
1916
ONTARIO POWER COMPANY OF NIAGARA FALLS v. STAMFORD CORPORATION.

twenty years. This by-law was confirmed by an Act of the Ontario Legislature (5 Edw. 7, c. 78). The appellants contended that they were entitled to be assessed at 100,000 dollars in respect of school rates. The respondents relied on the Public Schools Act, 1892, s. 4, which was re-enacted by the Public Schools Act, 1901, s. 77, and upon a decision of the Supreme Court of Canada (1) in their favour with regard to the assessment for 1913.

The terms of the by-law and of the relevant statutory provisions appear from the judgment of their Lordships.

Falconbridge C.J. gave judgment for the respondents, and on appeal to the Appellate Division that decision was affirmed.

1915. Dec. 18. *Sir R. Finlay, K.C.*, and *G. Osler*, for the appellants. The Public Schools Act, 1892, cannot override the confirming statute, which declared that the by-law should be valid "notwithstanding anything in any Act to the contrary." The by-law referred to "any assessment or taxation of any nature or kind whatsoever," and the confirming statute must be read as though it expressly mentioned school rates. The decision of the Supreme Court of Canada (1) as to the 1913 assessment (from which Duff J. dissented) was erroneous. [*Pringle* v. *City of Stratford* (2), *Canadian Pacific Ry. Co.* v. *City of Winnipeg* (3), and *Way* v. *City of St. Thomas* (4) were also referred to.]

P. O. Lawrence, K.C., and *Kingstone*, for the respondents. The by-law had not received the assent of two-thirds of the voters, and it granted an exemption for more than ten years; it therefore required, under the Consolidated Municipal Act, 1903, ss. 366a and 591a (*g*), statutory confirmation for its validity. The Public Schools Act, 1892, s. 4, provides that a by-law shall not be "held or construed" to exempt from school rates. The by-law was scheduled to the confirming Act and validated as a by-law; it must be taken as confirmed subject to the statutory construction of its terms imposed by s. 4. Since 1879 school rates in Ontario are levied and collected by the municipal councils on behalf of the school boards. The intention of the Legislature in enacting the Public Schools Act, 1892, s. 4, since re-enacted by the Public

(1) (1914) 50 Can. S. C. R. 168.
(2) (1909) 20 Ont. L. R. 246.
(3) (1900) 30 Can. S. C. R. 558.
(4) (1906) 12 Ont. L. R. 240.

Schools Acts of 1901 and 1909, ss. 77 and 39 respectively, and by R. S. Ont., 1914, c. 266, s. 39, was to prevent the municipalities from making agreements exempting from rates to the prejudice of the school authorities. It should be presumed that the Legislature by the confirming Act did not intend anything contrary to the settled policy of the Public Schools Acts. [*Toronto Public Schools Board* v. *City of Toronto* (1) was referred to.] If the confirming Act exempted the appellants in respect of school rates, that exemption was taken away by the subsequent re-enactment of s. 4 in 1909 and in 1914.

Sir R. Finlay, K.C., replied.

1916. Feb. 2. The judgment of their Lordships was delivered by

LORD BUCKMASTER L.C. In this case the Ontario Power Company of Niagara Falls claims that its property within the municipal corporation of the township of Stamford should be assessed for the purpose of all rates at the sum, fixed and unalterable until 1924, of 100,000 dollars.

This claim depends entirely upon the meaning of a statute of the Legislative Assembly of the Province of Ontario, passed on May 25, 1905. But though the construction of this statute is the sole subject for their Lordships' consideration, it is desirable to go back a short distance in the history before stating and examining the words of the Act.

It was stated to their Lordships in argument that since the year 1879 the municipal council of the township of Stamford has been the sole body to possess the right to levy and collect taxes within the district. The school authority, although it fixes the sum required to be raised for school purposes, has no power either to levy or collect. It also appears that the municipal authorities of the township, from the year 1879 onwards, in order to develop and realize the resources and possibilities of the district, granted to industrial undertakings a preferential treatment with regard to their taxes. This practice was regulated by the Municipal Act of 1887, and was even further controlled in 1892 by two statutes passed in that year. The first of these later Acts was called the Consolidated Municipal Act, and it contains in s. 366 the following

(1) (1902) 4 Ont. L. R. 468.

J. C. 1916 ONTARIO POWER COMPANY OF NIAGARA FALLS v. STAMFORD CORPORATION.

provisions: "Every municipal council shall by a two-thirds vote of the members thereof have the power of exempting any manufacturing establishment or any waterworks or water company, in whole or in part, from taxation, except as to school taxes, for any period not longer than ten years, and to renew this exemption for a further period not exceeding ten years." The other was the Public Schools Act, 1892, s. 4 of which was in the following terms: "No municipal by-law hereafter passed for exempting any portion of the rateable property of a municipality from taxation, in whole or in part, shall be held or construed to exempt such property from school rates of any kind whatsoever."

The former of these Acts was extended and re-enacted by the Consolidated Municipal Act, 1903; and this again provided that, in order to render a by-law of the municipality for granting a bonus in aid of any manufacturing industry a valid by-law, the assent of two-thirds of all the ratepayers who were entitled to vote should be obtained, this provision being subject to certain qualifications which are not necessary for the purpose of this case. In the same Act the word "bonus" is defined as a total or partial exemption from municipal taxation, or the fixing of the assessment of any property for a term of years; and the general provisions of the statute contained this further condition—that nothing in the Act should authorize any exemption for a longer period than ten years, nor any exemption, either partial or total, from taxation for school purposes. The provisions of the Public Schools Act, 1892, were also re-enacted from time to time, the last of such statutes being passed in 1914.

In 1900 the appellant company obtained a licence from the Park Commissioners of the Queen Victoria Niagara Falls Park to construct and operate within the area under their control certain works necessary to enable the falls of the Niagara river to be utilized for the conversion of its energy into electrical or hydraulic power. It is not plain at what time the work under this licence was begun, but it was at least as early as 1902. In 1904 the company was contemplating the expenditure of considerable sums in the municipality of Stamford for the construction and equipment of the plant necessary for its undertaking. The establishment of that work within the municipality was, no doubt, a matter that would prove

of considerable advantage to the locality; and the appellant company appears to have urged this before the municipality as a reason why it should receive consideration with regard to the assessable value of its property. Whether before the passing of the by-law any definite binding agreement was ever come to between the parties is not established by the evidence before their Lordships, nor is it necessary for the determination of the present dispute. So far as the documents show what transpired, it would appear that the company formulated a request for considerate treatment, and that this request was granted by the municipal authority, who promised that all the real estate, property, franchise, and effects of the appellants within their municipality should be permanently fixed, for the purposes of assessing the taxation, at the sum of 100,000 dollars; accordingly the municipality passed a by-law, which is known as by-law No. 11, and is stated to be a by-law relating to the assessment and taxation of the property of the appellant company. The by-law recited that it was expedient to grant the request of the company and enacted that the assessment should be fixed at 100,000 dollars apportioned as therein provided, that the assessment should last at this figure for every year between 1904 and 1924, "and that the said company and its property in the municipality shall not be liable for any assessment or taxation of any nature or kind whatsoever beyond the amount to be ascertained in each such year by the application of the yearly rate levied by the municipal council in each such year to the said fixed assessment of 100,000 dollars, apportioned as aforesaid." And it also enacted "that this by-law shall come into full force and effect immediately after the municipality shall be authorised by sufficient legislative or other authority to pass the same." This by-law appears to have been treated as a formal enacting provision of the municipality, was read a first, second, and third time, and was finally passed on October 10, 1904.

It is plain from consideration of the terms of the Consolidated Municipal Act, 1903, to which reference has been made, that this by-law was outside the power of the municipality. They could not have passed any by-law granting a relief—partial or total—in respect of taxation, or fixed an arbitrary basis of assessment, without a majority of two-thirds of the voters; and even with that

J. C. 1916 — ONTARIO POWER COMPANY OF NIAGARA FALLS v. STAMFORD CORPORATION.

majority they could not extend the period during which assessment should be fixed beyond the period of ten years; while, finally, not only were they unable to grant exemption from the school rate, but the Public Schools Act, 1892, which was then in force, provided that any by-law that dealt with the question of exemption should be construed and held not to have excluded the school rate.

If, therefore, this by-law had been within the competence of the municipal authority, notwithstanding the general words which it contained, it would have been held and construed as meaning that from those general words exemption from liability to the school rate should be excluded.

In the following year, on May 25, 1905, the statute was passed which has given rise to these proceedings. It is entitled "An Act to confirm By-law Number 11 of the Corporation of the Township of Stamford." This Act, after reciting the petition of the appellant company representing that by-law No. 11 of the municipal council should be confirmed and made legal and binding, in accordance with the intention and meaning thereof, contains in s. 1 the following passage: "By-law No. 11 of the Municipal Corporation of the Township of Stamford, set forth as Schedule 'A' to this Act, is legalised, confirmed, and declared to be legal, valid, and binding, notwithstanding anything in any Act contained to the contrary." By-law No. 11 is then scheduled to the Act.

Now it is important to observe that the Act does not purport to confirm any agreement whatever between the parties; it purports only to legalize and make binding the by-law, which was not legal and could not be made binding without statute, for the reasons that have been already set out.

The question on which this case depends is whether this statute confirms this by-law as a by-law subject to the interpretation to which such a by-law would be subject by virtue of the statute relating to public schools, or whether it confirmed it so as to enable its words to be read according to their general meaning and not in accordance with their statutory significance.

In their Lordships' opinion, the former is the true view of the case. The by-law did not attempt in express language to include the school rate among the rates for which exemption was granted. It

did, indeed, use wide and sweeping terms to describe the exemption; but had any question arisen upon the construction of that by-law between its passage and the passage of the Act of Parliament by which it was confirmed, it would have been necessary to construe it so as to limit the general words to rates other than the rate received for school purposes, and the school authority would have been entitled to rely on this as the true construction.

Their Lordships cannot think that the statute has altered this construction. It has enabled the by-law to be passed, it has confirmed the by-law and made it legal, but it still remains what it always purported to be—a by-law of the municipal authority carrying within it the meaning which the statute of 1892 had assigned.

It was strongly urged on behalf of the appellants that the words used in the Act meant the same as though a school rate had been expressly mentioned, and that, had the school rate been expressly mentioned, confirmation by the Legislature would necessarily have confirmed, as the Legislature had full power to do, a deviation from the ordinary statutory obligation. Their Lordships are not satisfied that this would have been the inevitable result, but, assuming that it were, it does not follow that the same result ensues when other and general language has been used. It should be remembered that the Act in question was promoted by the appellant company. It lay in their hands to make plain that which they desired. It does not at all follow that if the by-law had contained express words relating to the school rate it would have been accepted by the Legislature. Their Act must be assumed to confirm the by-law as it was drawn and with the meaning with which it was endowed; and speculation as to what might have happened had other words been used is unprofitable in an attempt to construe the actual language in which the Act was framed.

Their Lordships find that this view is in accordance with that expressed in the case of *Pringle* v. *City of Stratford* (1); and, indeed, that case is far stronger than the present, for an actual agreement to grant exemption for a consideration subsequently executed was in that case confirmed by the special statute, and

(1) 20 Ont. L. R. 246.

J. C. 1916

ONTARIO POWER COMPANY OF NIAGARA FALLS v. STAMFORD CORPORATION.

this fact appears to have greatly influenced Meredith J.A., who delivered a dissenting judgment.

For these reasons their Lordships will humbly advise His Majesty that this appeal be dismissed with costs.

Solicitors for appellants: *Blake & Redden.*

Solicitors for respondents: *Bischoff, Coxe, Bompas & Bischoff.*

[PRIVY COUNCIL.]

J. C.* 1916 *Feb. 7.*

HOLDITCH . . . . . APPELLANT;

AND

CANADIAN NORTHERN ONTARIO RAILWAY COMPANY . . . . . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Canada—Railway—Lands taken—Compensation—Severance—Impaired Access—Noise, Smoke, and Vibration—Disjoined Properties—Railway Act (*R. S. Can.*, 1906, *c.* 37), *s.* 155.

Upon the compulsory taking of lands under the Railway Act of Canada the owner is not entitled to compensation for severance from other lands owned by him unless the lands taken are so connected with, or related to, the lands left that he is prejudiced in his ability to use or dispose of the latter. Compensation for injury likely to arise from the access to lands being rendered more difficult by reason of the railway being carried along or across streets rests with the Board of Railway Commissioners upon making an order that the railway shall be so carried.

Further, an owner is not entitled to compensation for injurious affection by noise, smoke, and vibration to lands separate and disjoined from those taken. The language of s. 155 of the Railway Act is founded on that of the proviso to s. 16 of the Railways Clauses Consolidation Act, 1845, and the English decisions with regard to the effect of the latter section apply to the former.

APPEAL by special leave from a judgment of the Supreme Court of Canada (October 13, 1914) reversing a judgment of the Supreme Court of Ontario, Appellate Division (September 23, 1913), and restoring an award of arbitrators.

* *Present:* VISCOUNT HALDANE, LORD PARKER OF WADDINGTON, and LORD SUMNER.

In July, 1912, the respondents, by the deposit of plans and the giving of notices under the Railway Act (R. S. Can., 1906, c. 37), took for the purposes of their railway twenty lots of land belonging to the appellant at Sudbury, Ontario. The lots taken formed part of a block of land which, for the purpose of sale, had been subdivided by the appellant and his predecessor in title into over 500 lots intersected by thirteen streets according to a plan registered under the Registry Act and the Land Titles Act of the province. At the date of the proceedings about 300 of the lots remained in the ownership of the appellant, over 200 lots (interspersed among those 300) having been unconditionally sold. There was no building scheme in connection with the lots. The facts as to the character of the land in question are more fully stated in the judgment.

Arbitrators, appointed under the above Act, awarded as follows: (1.) They assessed the compensation for the twenty lots taken at 5315 dollars (as to this finding no further question arose). (2.) They found that forty-nine specified lots belonging to the appellant, but not taken, had been injuriously affected by being severed from the lots taken, and by the access thereto being made more difficult owing to the construction of the railway and the raising of the grade of the streets at crossings; this damage they assessed at 4800 dollars, but made no award, "considering that they were not warranted by the Railway Act and by law" to do so. (3.) As to forty further lots in respect of which the appellant claimed compensation on account of vibration, noise, and smoke from trains, they found that they "could not make any award" as to damages.

The present appellant appealed under s. 209 of the Act to the Appellate Division, which held that he was entitled to the 4800 dollars found under head (2.) of the award, that the forty lots referred to under head (3.) were injured, and that the award should be remitted to the arbitrators to assess the compensation.

On appeal to the Supreme Court of Canada, a majority of that Court, consisting of Sir Charles Fitzpatrick C.J., Idington J., and Brodeur J., reversed the above decision and restored the award. Duff and Anglin JJ. dissented as to the forty-nine lots, being of opinion that the present appellant was entitled to the 4800 dollars

J. C. 1916

HOLDITCH v. CANADIAN NORTHERN ONTARIO RAILWAY.

found by the award; as to the forty lots they held that there was no power to remit the award.

The appeal is reported, 50 Can. S. C. R. 265.

1915. Dec. 2, 3, 6. *McKay, K.C.*, for the appellant. Under s. 155 of the Railway Act the appellant was entitled to compensation for all damage sustained by him by reason of the exercise of the powers granted to the respondents. The terms of ss. 191, 193, and 198 indicate that he was entitled not only to compensation for the lots taken, but to damages for injurious affection to his other lots, whether arising from the construction or anticipated user of the railway. Compensation is recoverable under the Railway Act of Canada on a wider basis than under the Clauses Consolidation Acts of 1845. The judgments of the Board in *Parkdale Corporation* v. *West* (1) and in *North Shore Ry. Co.* v. *Pion* (2) show that the Railway Act gives compensation to persons whose land is not taken, and that in dealing with that Act little assistance can be derived from English authorities. The statutory provisions under consideration in those two appeals were in the same terms as s. 191 of the Railway Act. The words "exercise of the powers" in s. 155 cannot receive the limited construction given to them in *Hammersmith Ry. Co.* v. *Brand.* (3) That decision was no doubt followed in Canada in *In re Devlin and Hamilton and Lake Erie Ry. Co.* (4), but in each of those cases the relevant statute referred to injurious affection by the construction of the railway. The arbitrators found as a fact that lots not taken were damaged by severance and loss of access to the extent of 4800 dollars, and the evidence showed that further lots would be injured by vibration, noise, and smoke. The appellant's lots cannot each be treated as a separate and independent property merely because the land had been subdivided for purposes of sale. The appellant derived an advantage from a unity of control over the whole of his lots. Even if the case is governed by the English authorities, the appellant is entitled to compensation for injurious affection, whether by construction or user, to his lots not taken, but held with those

(1) (1887) 12 App. Cas. 602, 613.
(2) (1889) 14 App. Cas. 612, 624.
(3) (1869) L. R. 4 H. L. 171.
(4) (1876) 40 Upper Canada Q. B. 160.

taken: *Buccleuch* v. *Metropolitan Board of Works* (1); *Cowper Essex* v. *Acton Local Board* (2); *Horton* v. *Colwyn Bay and Colwyn Urban Council*. (3) The Appellate Division had power to remit the award: Railway Act (R. S. Can., 1906, c. 37), s. 209, sub-s. 2; Ontario Judicature Act (R. S. Ont., 1897, c. 57), s. 25; and Ontario Arbitration Act (9 Edw. 7, c. 35, Ontario), s. 12.

Armour, K.C., for the respondents. Upon the facts the lots must be regarded as each being a separate and independent property; there was no general building scheme, nor any advantage arising from unity of control. The appellant himself claimed in respect of each lot taken as a separate property. The facts distinguish the case from *Cowper Essex* v. *Acton Local Board*. (2) There was therefore no damage arising from severance. The only means of access to the lots was by the streets; compensation for injury arising from carrying a railway along or across a street can only be obtained from the Railway Board under 1 & 2 Geo. 5 (Canada), c. 22, s. 6. Injury of that character is not a subject of compensation upon arbitration proceedings: *Grand Trunk Pacific Ry. Co.* v. *Fort William Land Investment Co.* (4) Compensation under the Railway Act is upon the same basis as that under the Railways Clauses Consolidation Act, 1845. Both *Parkdale Corporation* v. *West* (5) and *North Shore Ry. Co.* v. *Pion* (6) were cases in which the railway company had not deposited plans or given notices so as to bring themselves within the Railway Act; they were therefore merely trespassers. Compensation is not recoverable in respect of lands not held with those taken for contemplated injury from user of the railway. Sect. 151 is not enlarged by ss. 191, 193, or 198. The English authorities on this point have been uniformly followed in Ontario: *In re Devlin and Hamilton and Lake Erie Ry. Co.* (7); *Powell* v. *Toronto, Hamilton and Buffalo Ry. Co.* (8) There was no power to remit: Railway Act, ss. 204 and 209; *In re McAlpine and Lake Erie and Detroit Ry. Co.* (9); *In re Davies and James Bay Ry. Co.* (10)

(1) (1872) L. R. 5 H. L. 418.
(2) (1889) 14 App. Cas. 153.
(3) [1908] 1 K. B. 327.
(4) [1912] A. C. 224.
(5) 12 App. Cas. 602.
(6) 14 App. Cas. 612.
(7) 40 Upper Canada Q. B. 160.
(8) (1898) 25 Ont. App. R. 209.
(9) (1902) 3 Ont. L. R. 230.
(10) (1913) 28 Ont. L. R. 544.

J. C.
1916
HOLDITCH
v.
CANADIAN NORTHERN ONTARIO RAILWAY.

McKay, K.C., in reply referred to *Bowen* v. *Canadian Southern Railway* (1), *In re Birely and Toronto, Hamilton and Buffalo Ry. Co.* (2), and *Powell* v. *Toronto, Hamilton and Buffalo Ry. Co.* (3)

1916. Feb. 7. The judgment of their Lordships was delivered by

LORD SUMNER. The appellant owns a considerable area of building land near Sudbury, Ontario, part of which the respondent railway company desired to take for the purposes of their line. The property had been marked out in numbered lots, and the railway company's notice specified twenty of these lots by their numbers as the land to be taken. The sum offered was 3300 dollars. It was unsatisfactory to Mr. Holditch, and this claim accordingly went to arbitration.

Although the notice served referred only to the twenty lots which were to be taken out and out, and contained no reference to any other lands or to the exercise of any other powers, the arbitration took a wide scope, and in the result the award dealt with three subjects: (*a*) lots taken; (*b*) severance and access; (*c*) vibration, noise, and smoke.

For the lots taken 5315 dollars were awarded, and upon this no question now arises. The award then found that forty-nine other lots were impaired in value by being severed from the appellant's other lands and being rendered more difficult of access, and found that they were injuriously affected to the extent of 4800 dollars. No award, however, was made under this head, as the arbitrators thought that the law did not warrant any. Lastly, they declared that they could not, and did not, award anything for injurious affection by vibration from trains and by noise and smoke. Their Lordships take it that the arbitrators considered this head of claim inadmissible in law. In fact, there was some evidence that a few lots were actually depreciated in selling value by the likelihood of noise, vibration, and smoke in the future operation of the line, and the award does not seem to have been meant as a finding against the existence of such injury or depreciation.

An appeal was taken to the Appellate Division of the Supreme Court of Ontario, and that Court unanimously allowed the appeal

(1) (1887) 14 Ont. App. R. 1. (2) (1897) 28 Ont. R. 468.
(3) 25 Ont. App. R. 209, 216.

as to 4800 dollars, directing that the present appellant should recover that sum, but referred the matter for the arbitrators to ascertain the damage caused or to be caused to forty lots (specified by their numbers) by the construction of the railway, with a declaration that the appellant was entitled to recover all damages sustained by him to the said property by reason of the construction of the railway. The forty lots so dealt with were entirely different from the forty-nine lots, in respect of which 4800 dollars were awarded. Reasons for this decision were not given in writing, and their Lordships have not the advantage of knowing the grounds upon which the Appellate Division allowed the appeal. Upon further appeal to the Supreme Court of Canada this decision was reversed and the original award was restored, but Anglin J. and Duff J. dissented, holding with the Appellate Division that the claimant was entitled to recover all damages sustained by him to the said property by reason of the construction of the said railway.

There may be several questions of procedure in this case, of which no doubt the most important is that of the alleged power to refer the case to the arbitrators after completion of their award. Their Lordships, however, are of opinion that it is not now necessary to determine or to discuss any of them, as the appeal may be decided upon the substantial questions of the claimant's rights in respect (*a*) of severance and access, and (*b*) of vibration, noise, and smoke injuriously affecting his property.

It is necessary to describe the property somewhat particularly. There was originally one large tract of land of very irregular contours, intersected by a winding creek and broken in places by an outcrop of rock. Some time ago the Manitoulin and North Shore Railway was constructed roughly following the direction of this creek, and only a little further off a portion of the Canadian Pacific Railway approached and eventually joined the Manitoulin and North Shore line. The respondents' railway was plotted to cut across the bend formed by the latter line and would also run in the neighbourhood of the creek. Independently of the respondents' line the land suffered some of the disadvantages of the proximity of railways.

The whole property had been surveyed and divided into building lots, and a plan showing the lay-out had been duly registered. The

J. C. 1916

HOLDITCH v. CANADIAN NORTHERN ONTARIO RAILWAY.

roads and streets had thus become public highways by force of the surveys and registry statutes applicable, but had not been made up. The total number of building lots was great, and many, if not all of them, had been staked out on the ground. The streets were numerous; they all intersected at right angles and the several lots were nearly always of the same dimensions. With one or two exceptions they were all rectangular parallelograms. All had access to a street, some to two streets. In the area in question there was no land not subdivided into lots of this kind, none consisting of fields or market gardens or agricultural back land. From time to time a great many lots had been sold by the appellant or his father, his predecessor in title, but they were scattered all over the property at haphazard. They had been bought for speculation. They had little individuality. They were chiefly distinguished by the numbers assigned to them and the name of the street on which they fronted. They were sold out and out. No restrictive covenants were taken. There was no building scheme other than the lay-out shown on the registered plan, and this derived its fixity from the legislation affecting it, and not from any notice to the purchaser or any private obligation entered into by him. It is plain that, so far as in them lay, the proprietors of this building estate had parcelled it out in lots, made an end of its unity (other than bare unity of ownership), and elected once for all to treat this multitude of lots as a commodity to trade in.

The basis of a claim to compensation for lands injuriously affected by severance must be that the lands taken are so connected with or related to the lands left that the owner of the latter is prejudiced in his ability to use or dispose of them to advantage by reason of the severance. The bare fact that before the exercise of the compulsory power to take land he was the common owner of both parcels is insufficient, for in such a case taking some of his land does no more harm to the rest than would have been done if the land taken had belonged to his neighbour. Compensation for severance therefore turns ultimately on the circumstances of the case. The appellant contended that the present case was governed by the decision in *Cowper Essex* v. *Acton Local Board* (1), and it was so held in the minority judgments in the Supreme Court of Canada. Their

(1) 14 App. Cas. 153.

Lordships are unable to agree in this view. In that case the building owner retained such control over the development and use alike of the parcels sold and of the parcels unsold as made a real and prejudicial difference between his ability to deal with what remained to him after the compulsory taking of land and his ability to deal as a whole with both it and the land taken before such compulsory taking. In the present case the appellant's relation to the property had been definitely fixed before any notice to take land was served at all. He had parcelled out the entirety of his estate and stereotyped the scheme, parted with numerous plots in all parts of it without retaining any hold over the use to be made of them, and converted what had been one large holding into a large number of small and separate holdings with no common connection except that he owned them all. There was one owner of many holdings, but there was not one holding, nor did his unity of ownership "conduce to the advantage or protection" of them all as one holding.

This being so, there is really but little left in the case. If the claim for severance fails it seems that, apart from the question of jurisdiction to send the award back to the arbitrators, the claim for loss of access must fall with it, for both are included in the one sum of 4800 dollars adjudged by the Appellate Division, and there are no materials on which separate compensation for loss of access can be assessed. Their Lordships, however, think that, the claim for severance failing, this further claim fails upon a broader ground.

Under the Dominion Railway Acts, which are the legislation applicable, it is from an order made by the Railway Board that the respondents must get power to take their line along or across the streets laid out by the appellant. Whether any order has as yet been obtained for this purpose does not appear, but the awarding of compensation to adjacent or abutting landowners, or the direction of alterations of levels, or other works in order to prevent injury to them, rests with the Board. The case is a most ordinary one. The contours of the ground crossed are not particularly steep. The streets need be made up to a height of a few feet at most in order to enable the traffic to cross the line. There are but few lots for which any relief works or compensation at all could be required. Their Lordships think that the arbitrators were right in rejecting

J. C.
1916
HOLDITCH
v.
CANADIAN NORTHERN ONTARIO RAILWAY.

claims in respect of difficulty of access to the appellant's land by reason of the railway's future user of the streets.

The claim for depreciation by the prospective annoyance from noise, smoke, and vibration was put thus: Sect. 155 of the Railway Act of Canada requires the company to "make full compensation . . . . to all persons interested for all damage by them sustained by reason of the exercise of" the powers granted to them by this or by their special Act, and ss. 191 and 193 use language which draws a distinction between compensation for land taken and for damage suffered from the exercise of any of the powers granted for the railway. It was argued that the interference with convenient access to some of the lots by reason of the line being taken across the streets and the annoyance to be expected from the noise, smoke, and vibration of passing trains alike constituted damage suffered from the exercise of the powers granted for the railway.

Their Lordships are unable to adopt this view. The substantive obligation upon the railway company to make compensation is derived from s. 155, and the other two sections are only concerned with the procedure by which this obligation is to be enforced. The language of s. 155 is taken, with modifications to which in this case no importance can be attached, from the proviso to s. 16 of the Railways Clauses Consolidation Act, 1845, and it is well settled by decisions of the highest authority that land so taken "cannot by its mere use, as distinguished from the construction of works upon it, give rise to a claim for compensation." The decisions on this construction of the Railways Clauses Consolidation Act have been applied to the Canadian legislation many years ago.

As soon as it is decided that the lands taken and the lands in respect of which the claims in question arise are in fact separate and disjoined properties, so that these claims have no connection with the lands taken, it follows upon authority which cannot now be questioned that the arbitrators were right in holding that the claims in respect of noise, smoke, and vibration were beyond their jurisdiction. Their Lordships will accordingly humbly advise His Majesty that this appeal should be dismissed with costs.

Solicitors for appellant: *Collyer-Bristow & Co.*
Solicitors for respondents: *Blake & Redden.*

[PRIVY COUNCIL.]

SAID & CO. . . . . APPELLANTS ;

AND

MAMODE HADEE . . . . . RESPONDENT.

J. C.*
1916
Feb. 10.

ON APPEAL FROM THE SUPREME COURT OF SEYCHELLES.

Seychelles—French Codes—Partnership—Expiration of Term—Partners continuing Business—Right to sue in Partnership Name—Code Civil, arts. 1834, 1865, *and* 1866—*Code de Commerce, art.* 42.

Under the provisions of the French Code Civil and Code de Commerce, which apply in Mauritius and the Seychelles, when the period expires for which a partnership (société en nom collectif) has been made it ceases to exist as a legal entity, save for the purpose of liquidation by a duly appointed liquidator, and it cannot sue for debts due to the partnership. The surviving partners cannot re-create or prolong the partnership by continuing the former business in the partnership name without entering into a fresh written agreement. If they so continue the business they cannot sue in the partnership name to recover money advanced and goods supplied partly before and partly after the time fixed for the expiration of the partnership.

APPEAL from a judgment of the Supreme Court of Seychelles (October 8, 1914).

The appellants sued the respondent in the above Court to recover Rs.27,529 as the balance of account for money advanced and goods supplied from December, 1902, to November 30, 1911. By their plaint they described the claim as made by "Said & Co., having for its manager Hajee Mamode Hossen." The respondent, "for his defence in limine litis," pleaded "that Hajee Mamode Hossen has no right, title, or capacity to represent the firm of Said & Co., as the commercial firm Said & Co. has come to an end since 1908."

The facts appear fully from the judgment of their Lordships and may be shortly stated as follows. By a duly registered deed, dated February 1, 1900, four persons therein named formed a "société en nom collectif" to trade in the Seychelles Islands under the name Said & Co., the partnership to be for five years. By a

* *Present:* EARL LOREBURN, LORD ATKINSON, LORD PARKER OF WADDINGTON, and LORD SUMNER.

J. C.
1916
SAID & Co. v. MAMODE HADEE.

further registered deed dated August 28, 1905, the partnership was continued for a period of three years from February 1, 1905, and it was provided that in the event of the decease of a partner the survivors should continue the partnership for the period stated. Mr. Said, the managing partner, died in 1906 and, under the terms of the second deed, was succeeded as manager by another partner, the above-named Hajee Mamode Hossen. After February 1, 1908, the surviving partners continued to carry on the business in the name of Said & Co. and entered into fresh transactions with the respondent. No liquidator was appointed. The respondent had been employed as cashier in the business of Said & Co. from a date prior to February, 1908, until March, 1911.

The law of Mauritius and of the Seychelles is that of the French Codes as they existed when promulgated for Mauritius and its dependencies by the arrêté of July 4, 1809, as modified by subsequent local legislation. The material articles are set out in the judgment.

Logan C.J. dismissed the suit, being of opinion that the appellants had no legal existence; he rejected the contention that the respondent was estopped from denying the existence of Said & Co. as a firm.

1916. Jan. 19, 20. *Disturnal, K.C.*, and *Woodcock*, for the appellants. The effect of art. 1834 of the Code Civil is merely probative; it does not make void a de facto partnership which is not constituted in writing. In the present case the surviving partners in fact continued the partnership business. The respondent having entered into contracts with the appellants in the name of Said & Co. since 1908 cannot deny the existence of the partnership. Art. 1865 of the Code Civil, which provides that a partnership ends upon the expiration of the time for which it was made, applies only as between the partners, and does not affect transactions entered into with third parties. So, too, the formalities as to registration required by arts. 42 and 46 of the Code de Commerce affect only the validity of the partnership "à l'égard des intéressés," that is to say, the partners. A société en nom collectif may exist as an être moral capable of suing in respect of transactions entered into with third persons although the formalities laid down by the Codes

have not been observed. [*Mauritius Tea Estate Co.* v. *Conservator of Mortgages* (1); *Goolam Hossen Mamode & Co.* v. *N. Chetty & Co.* (2); Pothier (ed. 1847), vol. 4, p. 268; and Laurent, vol. 26, par. 172, were referred to.]

Latter, for the respondent. A société en nom collectif ceases to exist as a legal entity at the expiration of the period for which it was created, save that it has a fictitious existence for the purpose of liquidation by a duly appointed liquidator: Lyon-Caen et Renault, Traité de Droit Commercial, vol. 2, par. 366; Dalloz, Nouveau Code Civil Annoté, vol. 4, art. 1865, pars. 17, 155, 158, 159; Dalloz, Code de Commerce Annoté, art. 21, par. 30. A société can only be continued after its expiration by a written agreement: Code Civil, art. 1866; Lyon-Caen et Renault, vol. 2, par. 304. The appellants cannot give a good discharge for debts due to the partnership, and the respondent would be liable to pay again to a properly appointed liquidator: Cour de Cassation, Dalloz, Recueil, 1863, p. 460. For the claim arising after February 1, 1908, the survivors can only be sued in their own names: Lyon-Caen et Renault, vol. 2, par. 1057. The first decision cited for the appellants merely recognizes the continued existence of a partnership for the purpose of liquidation; the second is not applicable to the present facts.

Disturnal, K.C., in reply, referred to Pardessus, Cours de Droit Commercial, vol. 2, par. 110, and to a decision of the Cour de Cassation, Dalloz, Recueil, 1848, p. 120.

Feb. 10. The judgment of their Lordships was delivered by

Lord Atkinson. This is an appeal from a judgment of the Supreme Court of Seychelles delivered on October 8, 1914, in favour of the respondent, on a defence in limine litis filed by him in an action brought by the appellants to recover the sum of Rs.27,529, the "balance of an account for money advanced and goods supplied to the defendant by the plaintiff from December, 1902, to November 30, 1911, with interest and costs." The plaint, with summons, though entitled "Said & Co., plaintiffs, against Mamode Hadee, defendant," opens with the statement "The firm Said & Co. having for its manager Hajee Mamode Hossen, of Victoria, Mahé, the

(1) (1906) Mauritius Reports, 1. (2) (1867) 7 Mauritius Decisions, 99.

J. C. 1916

SAID & Co. v. MAMODE HADEE.

plaintiff in this suit, claims . . . ." It would appear on the face of the documents that this manager, Hossen, is not made a plaintiff in the action, and no satisfactory reason was assigned in argument for the appearance of his name in the pleadings. No particulars are given as to the date or dates at which the money alleged to be advanced was in fact advanced, or the goods alleged to have been supplied were in fact supplied. On the face of the plaint it must therefore be taken that this firm of Said & Co., touching whose nature, origin, or mode of creation nothing whatever is stated, claim the right in the character of a firm as described to recover the entire balance alleged to be due upon transactions covering this extended period of nine years. The defendant on September 8, 1914, filed a defence traversing all the material averments in the plaint, and pleading that he never borrowed any money from the firm of Said & Co., and never was indebted to them in any sum for goods supplied. On September 17, 1914, the defendant filed an amended defence, which could scarcely be more ambiguous and embarrassing than it is if it had been designed to make it so. It runs thus: " The defendant for his defence in limine litis pleads that Hajee Mamode Hossen has no right, title or capacity to represent the firm Said & Co., as the commercial firm Said & Co. has come to an end since 1908."

That defence seems to treat Hossen as the proper person to have sued for the recovery of this money demand if the legal existence of his principal, Said & Co., had not terminated. But there is no allegation in the plaint that Hossen sues either in his own right or on behalf of any principal. The amended defence is not in the nature of a demurrer to the plaint, though it is admitted that the matters alleged in the latter are to be taken as true, but the issue raised by it as to the termination of the existence of Said & Co. was tried before the Chief Justice on October 1, 1914, Hossen being the only witness examined. He produced two deeds, which were given in evidence. From the first, dated February 5, 1900, and duly registered at Mauritius upon the same day, it appeared that a " société en nom collectif " to carry on general commerce in the Seychelles Islands was thereby formed between four persons therein named—namely, Mamode Maidee or Meddy, Hajee Mamode Hossen, Hajee Mahomed Rassoul, and Mr. Said—for a period of five years from February 1, 1900, in the name of Said & Co.

The second article contained in the deed ran thus: "Cette société est contractée pour une durée de cinq années à compter du premier février courant. Elle existera sous la raison sociale Said et Cie." By article 7 the direction of all the "affaires sociales" was vested in Mr. Said. He was made the administrator and general manager of the firm, and for that purpose was empowered to sign the firm's name; and it was further provided that, in case of the decease of one of the partners, and also in case "du décès des dames Meddy et Hossen," the partnership should continue to exist between the surviving members and the heirs of the deceased member, who should be represented by one person. The second deed bore date August 28, 1905, and was duly registered at Mauritius on the same day. It contains recitals that the duration of the "société" established by the deed of February 5, 1900, "sous la raison sociale Said et Cie.," had been fixed at five years from February 1, 1900; that it had therefore "pris fin" (terminated) on January 31, 1905; that it had not been put into liquidation, all "les intéressés" having decided to continue it, desiring to regularize their situation by fixing "le terme de durée de cette prolongation de société" and making certain modifications therein. The deed further provides that the "société" is renewed for a new period of three years from February 1, 1905, so that there may not be any interruption in the operations of the firm, and that Mr. Said is to continue to be administrator and manager of the firm's affairs. It provides for continuance of the firm in case of the decease of one of the partners and of Mesdames Maidee and Hossen, as in the earlier deed, and further provides that in case of the decease, absence, grave illness, or other "empêchement" of Mr. Said, the direction and administration of the firm should devolve upon Mr. Hossen, if he should be in Seychelles. Mr. Hossen, when examined, deposed that Mamode Maidee died in 1909 or 1910 leaving one child; that Mr. Said, who died in 1906, had given his share in the partnership to the witness's wife (Madame Hossen), who died in 1907; that he became manager of the company under the provisions of the aforesaid deeds on the death of Mr. Said, and had since continued in that position; that the company was not in liquidation, but that its business was being carried on as usual; that the defendant was in the office of Said &

J. C. 1916

SAID & CO. v. MAMODE HADEE.

Co. when the partnership came to an end, continued to be employed therein as cashier up to March, 1911, and kept a book (produced) in which he made entries, and had charge of the keys.

The question raised by this plea in limine litis is governed by certain provisions of the Code Civil and the Code de Commerce in force in the Seychelles, taken in connection with the principles laid down in certain cases and by certain text-writers to which their Lordships have been referred. By art. 1834 of the former Code, as translated in the respondent's case, it is enacted "that every partnership must be made in writing if it is for an object of which the value is over 150 fr."; and further that "no oral evidence shall be admitted against or beyond the contents of the articles of co-partnership, nor as to what might be alleged to have been said previously to the same or at the time thereof or since then even in the case of a sum or value less than 150 fr." The opening words of the article in the original are "Toutes sociétés doivent être rédigées par écrit." The primary meaning in English of the French verb "rédiger" is "to draw out" or "draw up," "to write out," "to make out."

It appears to their Lordships to be perfectly clear that according to the provisions of this article a "société" such as is mentioned in it can only be created or called into existence by a written document, and that writing is not, as was contended, merely evidence of a parol contract, which, though not enforceable unless thus proved, is yet, like a parol contract for the sale of lands, not void under the Statute of Frauds. By art. 1865 of the same Code it is enacted (according to the same translation), "A partnership expires ('La société finit') (1.) by the expiration of the time for which it has been formed; . . . . or (3.) by the natural death of one of the partners; . . . . (5.) by the wish expressed by one or several of the partners, not to remain partners." Art. 1866 enacts that "an extension of a partnership made for a fixed period can only be proved ('prouvée') by a writing made in the same form as the contract of co-partnership."

The function of the writing mentioned in this article is probative; the function of that mentioned in art. 1834 is creative. No deed or writing other than these two was ever executed or entered into touching this partnership. It appears clear, therefore, to their

Lordships that the legal entity created by the deed of February 5, 1900, and thereby styled Said & Co., ceased to exist for all purposes other than liquidation on January 31, 1908, and that it was not and could not be re-created or its existence prolonged simply by three of the surviving partners, though styled Said & Co., continuing to carry on its business up to the date of Maidee's death in 1909, or by two of them, namely, Hossen and Rassoul, continuing to do so afterwards up to March, 1911 : see Traité de Droit Commercial, by Lyon-Caen et Renault, vol. 2, pp. 240 and 244, arts. 363 and 367. If a liquidator be appointed it is well established that the partnership is by operation of law treated as prolonged for the purpose of enabling him by suing in his own name, if need be, to recover and administer assets of the partnership, but for that purpose solely : see Dalloz, 1863, p. 460. It appeared to their Lordships that Mr. Disturnal did not in his reply seriously dispute that the original partnership ended in January, 1908. What he contended for, as they understood him, was that a new partnership bearing the same name was created between the three surviving partners at that date ; and, as a partnership expires by the death of one of the partners, presumably that a third partnership bearing the same name was created between Hossen and Rassoul on the death of Maidee in 1909. But even if this were so, neither of these two new partnerships would be a société en nom collectif. At best each would only be an association commerciale en participation within the meaning of art. 47 of the Code de Commerce, styling itself, no doubt, Said & Co., but not having vested in it the assets of the original société of that name, nor entitled to recover the debts due to the latter. No evidence was given to show in whom the interest in the original partnership of Said, deceased, subsequently assigned to Madame Hossen, is now vested. Neither is it shown who is entitled to the interest of Mamode Maidee in the original société. It is plain that the mere use of the name Said & Co. would not of itself, apart from all questions of estoppel, entitle either of the new partnerships to recover a debt due to the original partnership. Again, a société en participation is not a personne morale, a legal entity, however much the participants may desire to make it so. Personnes morales can only be created by the authority of the Legislature, and under the conditions prescribed by the

J. C.
1916
SAID & Co.
v.
MAMODE HADEE.

Legislature, from which it follows that sociétés en participation are not considered as having an individuality distinct from that of the members composing them, with the result that the manager of such a partnership cannot represent it in any litigation, since that would violate the rule "nul ne plaide en France par procureur," and the members must consequently sue and be sued in their own names: Traité de Droit Commercial, by Lyon-Caen et Renault, arts. 90 (*e*), 105, 106, 1057, 1058.

The other authorities, with the exception of the two cases hereafter referred to, support these several propositions. Art. 42 of the Code de Commerce, in their Lordships' view, refers to the formalities to be observed in the registration and posting of extracts from the written documents creating sociétés en nom collectif et en commandite. All these formalities were duly observed in the reference to the original partnership. The article cannot have any application to sociétés or associations en participation, if such they were, created after February 1, 1908, because they were not created by any written instrument.

Counsel for the appellant contended, however, that, though the condition of things may be in law and fact such as above described, the respondent is estopped from asserting that the legal entity created in February, 1900, ceased to exist on January 31, 1908, or at any time before March, 1911, and this though they have failed to produce any authority to show that if the respondent paid to the plaintiff the debt sued for and a liquidator of the original partnership were subsequently appointed that liquidator could not recover over again from the respondent the portion of the debt now sued for which properly formed portion of the assets of the original firm, this payment as against him being no discharge. Unless the estoppel goes this length it is of no avail to the appellant. It may be that the respondent may be estopped from denying that he dealt with an association of persons styling themselves Said & Co. But that is equally consistent with that association being a société en nom collectif or a société en commandite or an association commerciale en participation. If that be so he is not estopped from asserting that it is the last mentioned of the three and not either of the others; and if it be this last one the members, not forming a "personne morale," must sue in their own names. Two cases were relied upon

on behalf of the appellants, namely, *Goolam Hossen Mamode & Co.* v. *N. Chetty & Co.* (1) and that reported at pp. 120 and 121, Dalloz (1848). In the first of these a partnership " en nom collectif " had apparently been duly constituted by deed, but the formalities prescribed by art. 42 of the Code de Commerce had not been observed. The defendant had dealt with the partnership in its partnership name. The case turned upon the construction of the following clause of the article : " Ces formalités seront observées, à peine de nullité, à l'égard des intéressés : mais le défaut d'aucune d'elles ne pourra être opposé à des tiers par les associés." It appears to have been held that the word " intéressés " only included the members of the partnership ; that the société could not, as against persons other than these members, rely upon the " nullité " brought about by the non-observance of any of the prescribed formalities, and that the defendant, having dealt with the société as an existing société, was equally estopped from relying on this " nullité." The terms of the deed creating the partnership are not stated. It does not appear whether the partnership was created for any and, if so, for what term, and if created for a term whether or not that term had elapsed. All that was decided was that the defendant was estopped from saying a society was a " nullité," i.e., did not exist, when, by dealing with it in its partnership name, he had in effect asserted that it did exist. The case may have been well or ill decided. Upon that point it is not necessary for their Lordships to express any opinion, but they are quite clear that it does not apply to the present case, inasmuch as all the formalities prescribed by art. 42 were observed in the case of the original société, the term of whose existence was fixed by deed, and that the article has no application to associations not created by deed.

In the second case a widow, one of the members of a firm, which had continued to carry on business after the term for which it was originally created had expired, settled upon her son-in-law, on his marriage, a certain proportion of her capital in the firm, with a stipulation that it should not be withdrawn from the partnership. What was decided was that this son-in-law was a creditor of his mother-in-law, not of the firm, and that, having regard to the decree made in the case and to the other circumstances, the sum so

(1) 7 Mauritius Decisions, 99.

J. C. 1916

SAID & Co. v. MAMODE HADEE.

settled could not be withdrawn from the funds of the partnership so as to defeat the claims of its creditors. It is obvious that this decision does not apply to the present case.

Their Lordships are, for the reasons already mentioned, of opinion that the decision appealed from was right, and that this appeal should be dismissed with costs, and they will humbly advise His Majesty accordingly. At the same time they think that every facility should be given to the appointment of a liquidator to wind up the affairs of the original partnership, in order, amongst other things, that the defendant may be compelled to pay any debts he may owe to it at least once and be protected from the risk of having to pay them twice over. This is, of course, without prejudice to any proceedings the above-mentioned second and third firms may be advised to take to recover debts due by him to them respectively.

Solicitors for appellants : *Farrar, Porter & Co.*
Solicitors for respondent : *Loughborough, Gedge, Nisbet & Drew.*

[PRIVY COUNCIL.]

J. C.* 1916 *Feb.* 23.

COOK . . . . . APPELLANT;

AND

G. S. DEEKS AND OTHERS . . . . . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF ONTARIO, APPELLATE DIVISION.

Company—Directors—Contract—Exclusion of Company—Breach of Duty—Ratification by General Meeting—Voting Power of Directors—Invalidity.

Three directors of a company carrying on the business of railway construction contractors obtained a contract in their own names to the exclusion of the company. The contract was obtained under circumstances which amounted to a breach of trust by the directors and constituted them trustees of its benefits on behalf of the company. By their votes as holders of three-quarters of the issued shares they subsequently passed a resolution at a general meeting

---

* *Present :* LORD BUCKMASTER L.C., VISCOUNT HALDANE, LORD PARKER OF WADDINGTON, and LORD SUMNER.

of the shareholders declaring that the company had no interest in the contract :—

Held, that the benefit of the contract belonged in equity to the company, and the directors could not validly use their voting power to vest it in themselves.

North-West Transportation Co. v. *Beatty* (1887) 12 App. Cas. 589 and *Burland* v. *Earle* [1902] A. C. 83 distinguished.

APPEAL from a judgment of the Supreme Court of Ontario, Appellate Division (March 2, 1915), affirming the judgment of Middleton J. at the trial.

The action was brought in the High Court Division of the Supreme Court of Ontario by the appellant, suing on behalf of himself and all other shareholders in the Toronto Construction Company, Limited, against the respondents G. S. Deeks, G. M. Deeks, T. R. Hinds, and the Dominion Construction Company, Limited, for a declaration that the above respondents were trustees for the Toronto Construction Company, Limited (who were joined as defendants), of the benefit of a contract dated April 1, 1912, made between the individual respondents and the Canadian Pacific Railway Company, and for ancillary relief.

The facts are fully stated in the judgment of their Lordships.

Middleton J. dismissed the action, and this decision was affirmed by the Appellate Division (Hodgins J.A., Falconbridge C.J., Latchford J., and Kelly J.). The proceedings in the latter Court are reported at 33 Ont. L. R. 209.

1915. Nov. 30 ; Dec. 1, 6, 7. *Nesbitt, K.C.*, and *A. M. Stewart*, for the appellant. The respondent directors committed a breach of duty towards the company in entering into the contract of April 1, 1912. They improperly used their position of managers and the reputation of the company to obtain the contract for themselves to the exclusion of the company. The subsequent resolution of the general meeting, carried by the respondents' own voting power, cannot regularize their position. The Appellate Division relied largely upon *North-West Transportation Co.* v. *Beatty*. (1) That case is distinguishable, since the benefit of the contract here in equity formed part of the assets of the company. *Burland* v. *Earle* (2) is distinguishable upon the same ground.

(1) 12 App. Cas. 589. (2) [1902] A. C. 83.

J. C
1916
COOK
v.
DEEKS.

Sir R. Finlay, K.C., and *R. McKay, K.C.*, for the respondents. Both Courts in Canada found that there had been no fraud and preferred the evidence of the individual respondents to that of the appellant. The respondent directors, as a majority of the board, had the right to determine that the company should not enter into further business. The engaging or not engaging in any particular contract was entirely a question of the policy and internal management of the company and within the discretion of the majority of the directors. The Canadian Pacific Railway presumably intended to give the contract to the respondents and not to the company. The resolution of the shareholders was an effectual ratification and cannot be questioned by a minority. It did not deal with any property of the company. [*Burland* v. *Earle* (1), *Dominion Cotton Mills Co.* v. *Amyot* (2), *In re Lands Allotment Co.* (3), and *Normandy* v. *Ind, Coope & Co.* (4) were referred to.]

Nesbitt, K.C., replied.

1916. Feb. 23. The judgment of their Lordships was delivered by

LORD BUCKMASTER L.C. The appellant in this case is the plaintiff in a suit brought against the respondents, under circumstances to which full reference is necessary; his rights depend entirely upon the fact that he is, and has throughout the whole history of these proceedings been, a shareholder in the Toronto Construction Company, Limited, one of the defendants in the suit. Between himself and the defendants G. S. Deeks, G. M. Deeks, and T. R. Hinds there have been at sundry times various business arrangements and relationships outside their association in the Toronto Construction Company; but, except for the purpose of explaining what may have caused the conduct to which these proceedings are due, it is unnecessary to refer at length to these relationships.

The respondent the Toronto Construction Company was formed some time in 1905; the date of its incorporation is nowhere exactly stated, nor is it material. It appears that at the date of its incorporation all the parties were in business in various parts of the Dominion of Canada and the United States of America as contractors. The

(1) [1902] A. C. 83.
(2) [1912] A. C. 546, 552.
(3) [1894] 1 Ch. 617.
(4) [1908] 1 Ch. 84.

two defendants G. S. Deeks and G. M. Deeks were in partnership, and had just completed for the Canadian Pacific Railway Company a subway under the track of the Canadian Pacific Railway at Winnipeg. In 1905 the Canadian Pacific Railway were asking for tenders for the construction of a line from Bolton to Parry Sound known as the Toronto Sudbury line, and the tenders of G. S. Deeks, made, as it would appear, on behalf of the firm of Deeks & Deeks, were accepted by the company. Before tendering, arrangements had been made by Messrs. Deeks with a firm of Winters, Parsons & Boomer that they should take an interest in the contract to the extent of one-half if G. S. Deeks were successful in obtaining it. Mr. Winters, however, had assumed certain obligations which rendered him unwilling to accept his full share of responsibility, and the plaintiff and the defendant Hinds were accordingly introduced by him to Mr. Deeks in order to supplement his obligation, with the result that all the parties agreed to share in the contract in the following proportions: G. S. Deeks and G. M. Deeks to take three-eighths, the plaintiff and the defendant Hinds to take three-eighths, and Winters, Parsons & Boomer one quarter. In order to place these relationships upon a fixed foundation, and the better to define their interests, the Toronto Construction Company was formed and its share capital distributed in the proportions mentioned, the company taking over and carrying out the work under the contract.

In 1906 Messrs. Winters and Boomer withdrew from the company, and the stock that they held was divided equally among the remaining parties, so that the plaintiff and each of the three defendants G. S. Deeks, G. M. Deeks, and T. R. Hinds held one-fourth of the entire capital of the company, with the exception of four shares held by Mrs. Deeks (the wife of G. S. Deeks), whose introduction as a shareholder was necessary in order to provide the total number of five. These interests have remained unchanged down to the present time.

The board of directors was comprised of Messrs. Deeks, Hinds, and the plaintiff, and, in addition, G. S. Deeks was appointed president of the company, the plaintiff was general manager, and Hinds was secretary and treasurer, though their Lordships do not think that the description of these offices affords an accurate description of the duties assumed and discharged by the various

J. C. 1916 COOK v. DEEKS.

parties. The company appears to have carried out the work of laying the Toronto Sudbury line to the entire satisfaction of the Canadian Pacific Railway, and they continued to tender and were fortunate in obtaining a considerable number of other contracts of great value from the Canadian Pacific Railway. Apart, however, from this work they undertook no other contracts. As has been already stated, during part of the time of the operations of the company the plaintiff and the three defendants were associated together in various other enterprises of a similar nature in Montana and in the west, but no contracts were taken in the east excepting by the Toronto Construction Company. In 1907 disagreement appears to have arisen between the parties, and the different firms which had been constructed between them, and were all partnerships at will, were dissolved, and the parties refused to enter into any further voluntary arrangements between themselves.

Subsequently in 1909 the Canadian Pacific Railway Company invited tenders for an important contract, known as Seaboard No. 2, a contract which involved the continuation of a line which had been already laid by the Toronto Construction Company. This contract was tendered for by the company, in competition with others, in the usual way. Their tender did not appear to be the lowest. In consideration, however, of the company having previously constructed the line known as Seaboard No. 1, the company was given the contract at the lowest price. The date of that contract was May 14, 1910. Seaboard No. 3 was again taken up on behalf of the Toronto Construction Company, and apparently the negotiations for it were entirely conducted by Mr. Hinds, or at any rate by Mr. Hinds and Mr. Deeks; while finally a contract known as the Guelf Junction and Hamilton branch was also taken on April 29, 1911, Mr. Leonard acting for the Canadian Pacific Railway, and either G. S. or G. M. Deeks acting on behalf of the company. As this contract was nearing completion, the defendant Hinds gave the manager of the Toronto Construction Company (H. F. McLean) instructions to get the work through as quickly as possible, as other work was coming up. [The judgment set out a passage from the evidence of Mr. McLean in which he stated that Mr. Hinds told him that the other work referred to was that afterwards known as the South Shore contract.]

The South Shore contract is the one which has given rise to the present dispute, and it is of the utmost importance to follow closely the circumstances under which it was obtained. The representative of the Canadian Pacific Railway Company was a Mr. Leonard, and it was he who arranged some, though it is impossible to say how many, of the contracts effected with the Toronto Construction Company on behalf of the railway company. His negotiations were always carried out either with Mr. Deeks or with Mr. Hinds. He never discussed any details with any other person, and he never saw the plaintiff in the office, though he sometimes saw him on the line. The management of Messrs. Deeks and Hinds of the affairs of the construction company was eminently satisfactory; but so far as railway construction was concerned the whole of their reputation for the efficient conduct of their business had been gained by them while acting as directors of the Toronto Construction Company. In 1911, and probably at an earlier date, the three defendants had settled that they would no longer continue business relationships with the plaintiff. It is unnecessary to seek the cause of the quarrel, or to determine whether they had good reason for the opinion that they had formed. There was nothing to compel them to work with or for the plaintiff, and it is impossible to see that they were bound to continue their relationship with him by any legal or moral consideration. They were, however, involved with him in different reciprocal duties, by reason of their relationship in connection with the Toronto Construction Company, and if they desired freedom to act, without regard to the restrictions that those relationships imposed, it was necessary that they should terminate their position as directors and shareholders in the company and place it in dissolution. This they could easily have accomplished owing to the fact that they held three-fourths of the share capital. It is suggested that they might also have resolved at a general meeting of the company that the company should no longer continue the work. This would have been all but equivalent to a resolution of voluntary liquidation; but even this step was not taken. While still retaining their position as directors, while still actually acting as managers of the company, and with their duties to the company of which the plaintiff was a shareholder entirely unchanged, they proceeded to negotiate with Mr. Leonard for the new Shore Line contract,

J. C.
1916
COCK
v.
DEEKS.

in reality on their own behalf, but in exactly the same manner as they had always acted for the company, and doubtless with their claims enforced by the expeditious manner in which they, while acting for the company, had caused the last contract to be carried through.

The negotiations for this contract were opened by a telephone message sent through to Mr. Hinds at the Toronto Construction Company's office. Upon receipt of that message certain units of price were prepared in the company's office, and, the prices being ultimately fixed, the defendant Hinds was informed by Mr. Leonard that, although the prices had been agreed to, the contract would not be then immediately let, as it was necessary that there should be an appropriation of the necessary cash made to authorize the contract by the Canadian Pacific Railway Company.

During the whole of this discussion, up till the time when these prices were fixed, it does not appear that at any moment the representatives of the Canadian Pacific Railway Company were told that this contract was in any way different from the others that had been negotiated in the same manner on behalf of the Toronto Construction Company, although it was plain that Mr. Leonard had been told by Mr. Deeks, when he was engaged on the Georgian Bay and Seaboard line, that when it was finished Messrs. Deeks and Hinds intended to go on their own account and leave Mr. Cook. But after all the necessary preliminaries of the contract had been concluded Mr. Hinds made to Mr. Leonard this statement: "Remember, if we get this contract it is to be Deeks and I, and not the Toronto Construction Company."

On March 12, 1912, the Canadian Pacific Railway Company made the necessary appropriation for the contract, and this was communicated to Mr. Deeks by Mr. Ramsay, that company's engineer of construction, who said that they might proceed with the contract at once. As from this moment, although the formal contract was not signed until April 1, 1912, the defendants became certain of their position, and knew that they had obtained the contract for themselves. They then for the first time informed the plaintiff of what had happened. He protested without result, and the defendant the Dominion Construction Company was formed by the three defendants G. S. Deeks, G. M. Deeks, and T. R. Hinds

to carry out the work. The contract was accordingly taken over by this company, by whom the work was carried out and the profits made.

On March 20, 1912, there was a meeting of directors of the Toronto Construction Company, at which the three defendants were present, and they resolved that a fresh meeting of the shareholders be held to consider the question of the voluntary liquidation of the company. Ultimately, after sundry meetings which are really not material, on April 26, 1913, resolutions were passed owing to the voting power of the defendants G. S. Deeks, G. M. Deeks, and T. R. Hinds, approving the sale of part of the plant of the company to the Dominion Construction Company, and a declaration was made that the company had no interest in the Shore Line contract, and that the directors were authorized to defend this action, which had in the meantime been instituted.

Two questions of law arise out of this long history of fact. The first is whether, apart altogether from the subsequent resolutions, the company would have been at liberty to claim from the three defendants the benefit of the contract which they had obtained from the Canadian Pacific Railway Company; and the second, which only arises if the first be answered in the affirmative, whether in such event the majority of the shareholders of the company constituted by the three defendants could ratify and approve of what was done and thereby release all claim against the directors.

It is the latter question to which the Appellate Division of the Supreme Court of Ontario have given most consideration, but the former needs to be carefully examined in order to ascertain the circumstances upon which the latter question depends.

It cannot be properly answered by considering the abstract relationship of directors and companies; the real matter for determination is what, in the special circumstances of this case, was the relationship that existed between Messrs. Deeks and Hinds and the company that they controlled. Now it appears plain that the entire management of the company, so far as obtaining and executing contracts in the east was concerned, was in their hands, and, indeed, it was in part this fact which was one of the causes of their disagreement with the plaintiff. The way they used this position is perfectly plain. They accelerated the work on the expiring contract of the

J. C. 1916 COOK v. DEEKS.

company in order to stand well with the Canadian Pacific Railway when the next contract should be offered, and although Mr. McLean was told that the acceleration was to enable the company to get the new contract, yet they never allowed the company to have any chances whatever of acquiring the benefit, and avoided letting their co-director have any knowledge of the matter. Their Lordships think that the statement of the trial judge upon this point is well founded when he said that "it is hard to resist the inference that Mr. Hinds was careful to avoid anything which would waken Mr. Cook from his fancied security," and again, that "the sole and only object on the part of the defendants was to get rid of a business associate whom they deemed, and I think rightly deemed, unsatisfactory from a business standpoint." In other words, they intentionally concealed all circumstances relating to their negotiations until a point had been reached when the whole arrangement had been concluded in their own favour and there was no longer any real chance that there could be any interference with their plans. This means that while entrusted with the conduct of the affairs of the company they deliberately designed to exclude, and used their influence and position to exclude, the company whose interest it was their first duty to protect.

It is quite impossible to enter into the speculations which form part of the examination of Mr. Leonard and Mr. Ramsay on behalf of the Canadian Pacific Railway. What might have happened if the railway company from the first considered Mr. Cook as a possible competitor, or considered the position of the Toronto Construction Company apart from Messrs. Deeks and Hinds, is a matter too conjectural to be brought into consideration. Their Lordships think that the Appellate Division of the Supreme Court of Ontario may have been misled in the attempts that they made to see whether this particular duty of the defendants had been the subject of previous judicial decision. Their Lordships see no reason to differ from the opinion which the Appellate Division extracted from careful consideration of the authorities, except so far as they were led by these conclusions to regard the transaction as a question of policy and a matter that lay entirely within the directors' individual discretion. But this reservation is important, for throughout the whole of the judgments, both of the learned judge who tried

this case and of the Appellate Division, there is underlying rather the question as to whether the transaction was not one which, by virtue of their preponderating influence in the company, the defendants would be able ultimately to put right than the real question of whether it was one into which, consistently with their duty, they were at liberty to enter.

It is quite right to point out the importance of avoiding the establishment of rules as to directors' duties which would impose upon them burdens so heavy and responsibilities so great that men of good position would hesitate to accept the office. But, on the other hand, men who assume the complete control of a company's business must remember that they are not at liberty to sacrifice the interests which they are bound to protect, and, while ostensibly acting for the company, divert in their own favour business which should properly belong to the company they represent.

Their Lordships think that, in the circumstances, the defendants T. R. Hinds and G. S. and G. M. Deeks were guilty of a distinct breach of duty in the course they took to secure the contract, and that they cannot retain the benefit of such contract for themselves, but must be regarded as holding it on behalf of the company.

There remains the more difficult consideration of whether this position can be made regular by resolutions of the company controlled by the votes of these three defendants. The Supreme Court have given this matter the most careful consideration, but their Lordships are unable to agree with the conclusion which they reached.

In their Lordships' opinion the Supreme Court has insufficiently recognized the distinction between two classes of case and has applied the principles applicable to the case of a director selling to his company property which was in equity as well as at law his own, and which he could dispose of as he thought fit, to the case of a director dealing with property which, though his own at law, in equity belonged to his company. The cases of *North-West Transportation Co.* v. *Beatty* (1) and *Burland* v. *Earle* (2) both belonged to the former class. In each, directors had sold to the company property in which the company had no interest at law or in equity. If the company claimed any interest by reason of the

(1) 12 App. Cas. 589. (2) [1902] A. C. 83.

J. C. 1916 COOK v. DEEKS.

transaction, it could only be by affirming the sale, in which case such sale, though initially voidable, would be validated by subsequent ratification. If the company refused to affirm the sale the transaction would be set aside and the parties restored to their former position, the directors getting the property and the company receiving back the purchase price. There would be no middle course. The company could not insist on retaining the property while paying less than the price agreed. This would be for the Court to make a new contract between the parties. It would be quite another thing if the director had originally acquired the property which he sold to his company under circumstances which made it in equity the property of the company. The distinction to which their Lordships have drawn attention is expressly recognized by Lord Davey in *Burland* v. *Earle* (1) and is the foundation of the judgment in *North-West Transportation Co.* v. *Beatty* (2), and is clearly explained in the case of *Jacobus Marler Estates* v. *Marler* (3), a case which has not hitherto appeared in any of the well-known reports.

If, as their Lordships find on the facts, the contract in question was entered into under such circumstances that the directors could not retain the benefit of it for themselves, then it belonged in equity to the company and ought to have been dealt with as an asset of the company. Even supposing it be not ultra vires of a company to make a present to its directors, it appears quite certain that directors holding a majority of votes would not be permitted to make a present to themselves. This would be to allow a majority to oppress the minority. To such circumstances the cases of *North-West Transportation Co.* v. *Beatty* (2) and *Burland* v. *Earle* (1) have no application. In the same way, if directors have acquired for themselves property or rights which they must be regarded as holding on behalf of the company, a resolution that the rights of the company should be disregarded in the matter would amount to forfeiting the interest and property of the minority of shareholders in favour of the majority, and that by the votes of those who are interested in securing the property for themselves. Such use of voting power has never been sanctioned by the Courts, and,

(1) [1902] A. C. 83.
(2) 12 App. Cas. 589.
(3) House of Lords, April 14, 1913.

indeed, was expressly disapproved in the case of *Menier* v. *Hooper's Telegraph Works.* (1)

If their Lordships took the view that, in the circumstances of this case, the directors had exercised a discretion or decided on a matter of policy (the view which appears to have been entertained by the Supreme Court) different results would ensue, but this is not a conclusion which their Lordships are able to accept. It follows that the defendants must account to the Toronto Company for the profits which they have made out of the transaction. Their Lordships will therefore humbly advise His Majesty that the judgments of Middleton J. and of the Appellate Division be set aside, and that the case be referred back to the High Court Division of the Supreme Court of Ontario for the purpose of taking such account. There must not be included in such account any claim in respect of the plant purchased from the Toronto Company; their Lordships are satisfied by the evidence that this was bought at the fair market price. Their Lordships have throughout referred to the claim as one against the defendants G. S. Deeks, G. M. Deeks, and T. R. Hinds. But it was not, and it could not be, disputed that the Dominion Construction Company acquired the rights of these defendants with full knowledge of all the facts, and the account must be directed in form as an account in favour of the Toronto Company against all the other defendants. The respondents must pay the costs of the appellant here and in the Courts below, and the costs of taking the account will be dealt with in the Supreme Court. Although the account is in favour of the Toronto Company, the plaintiff must have the conduct of the proceedings.

Solicitors for appellant: *Blake & Redden.*
Solicitors for respondents: *Collyer-Bristow & Co.*

(1) (1874) L. R. 9 Ch. 350.

[PRIVY COUNCIL.]

J. C.* 1916 Feb. 24.

BONANZA CREEK GOLD MINING COMPANY, LIMITED . . . . . } APPELLANTS;

AND

THE KING . . . . . RESPONDENT;

AND

ATTORNEY-GENERAL FOR THE PROVINCE OF QUEBEC AND OTHERS . . . } INTERVENERS.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Canada—Legislative Authority of Province—Incorporation of Companies —"With provincial objects"—Capacity outside Province—Letters Patent—Prerogative Power—Yukon Territory—Free Miner's Certificate—"Canadian Charter"—British North America Act, 1867 (30 & 31 *Vict. c.* 3), *ss.* 12, 46, 91, 92—*Ontario Companies Act* (*R. S. Ont.*, 1897, *c.* 191), *s.* 9.

Sect. 92 of the British North America Act, 1867, confines the actual powers and rights which a provincial Government can bestow upon a company, either by legislation or through the Executive, to powers and rights exercisable within the province, but does not preclude a province either from keeping alive the then existing power of the Executive to incorporate by charter so as to confer a general capacity analogous to that of a natural person, or to legislate so as to create, by or by virtue of a statute, a corporation with this general capacity. The power of incorporation by charter transferred to the Lieutenant-Governor of the province of Ontario by s. 65 of the above mentioned Act has not been abrogated or interfered with by the Ontario Companies Act (R. S. Ont., 1897, c. 191).

The doctrine of *Ashbury Railway Carriage and Iron Co.* v. *Riche* (1875) L. R. 7 H. L. 653 does not apply to a company which derives its existence from the act of the Sovereign and not merely from the regulating statute:—

Held, therefore, that a company incorporated by letters patent issued by the Lieutenant-Governor of Ontario under the Ontario Companies Act (R. S. Ont., 1897, c. 191), s. 9, with the object of carrying on the business of mining, has a status and capacity which enable it to accept and exercise mining leases and rights in the

---

* *Present:* LORD BUCKMASTER L.C., VISCOUNT HALDANE, LORD PARKER OF WADDINGTON, and LORD SUMNER.

Yukon Territory conferred by the authorities of the Dominion and the Yukon Territory.

Held, further, that a company incorporated under the Ontario Companies Act is "incorporated under a Canadian charter" within the meaning of the regulations governing the issue of a free miner's certificate in the Yukon Territory.

APPEAL, by special leave, from a judgment of the Supreme Court of Canada (February 2, 1915) affirming the judgment of the Exchequer Court of Canada.

The appellants were incorporated on December 23, 1904, by letters patent issued by the Lieutenant-Governor of the province of Ontario under the authority of the Ontario Companies Act (R. S. Ont., 1897, c. 191) and of any other power or authority vested in him. The purpose and objects of the company stated in the letters patent were, so far as material, to carry on the businesses of mining and exploration in all their branches, and for such purposes to acquire by purchase, lease, or otherwise rights, powers, and concessions to enable the company properly to exercise and carry on all or any of its rights, powers, and objects. There were no words which limited the area of the company's operations. For some years prior to the litigation the appellants had been operating certain hydraulic mining properties in the Yukon. The properties were the subject of leases granted by the Crown through the Minister of the Interior for Canada, of which leases the appellants were assignees with the consent of the Crown. In 1907 the Crown leased to the appellants further claims. There had also been issued to the appellants a free miner's certificate, dated December 24, 1904, under the regulations governing placer mining in the Yukon (Stat. of Can., 1 Edw. 7, p. xlix.), and a licence, dated September 7, 1905, from the Yukon Commissioner, under s. 2, sub-s. 2, of the Foreign Companies Ordinance (Consolidated Ordinances of the Yukon Territories, 1902, c. 59), the latter authorizing them to carry on their business in the Yukon.

By a petition of right, dated January 27, 1908, the appellants claimed damages in respect of alleged breaches by the Crown of agreements contained in the leases. The Crown delivered an answer by which it was denied that the appellants had any power to carry on mining or to hold mining leases in the Yukon, and it was further

J. C. 1916

BONANZA CREEK GOLD MINING COMPANY, LIMITED v. REX.

pleaded that there was no power to grant a free miner's certificate to the appellants, a provincial company, nor power in them to accept one. The material paragraphs of the answer are set out in the judgment.

The Exchequer Court of Canada stayed the proceedings pending the determination by that Court of the questions of law so raised; upon their argument Cassels J. dismissed the petition of right.

Upon appeal to the Supreme Court of Canada, a majority of that Court (Sir C. Fitzpatrick C.J. with Davies and Duff JJ., Idington and Anglin JJ. dissenting) affirmed the decision of Cassels J. The majority were of opinion that the appellants under their letters patent of incorporation had neither the power nor capacity to carry on mining outside the province of Ontario. The appeal is reported, 50 Can. S. C. R. 534.

The appellants appealed by special leave. The Board directed that the arguments in *Attorney-General for Ontario* v. *Attorney-General for Canada*, reported post, p. 598, so far as that appeal involved questions arising in the present appeal, should be heard together with the present appeal, the parties in both appeals being heard.

The following counsel appeared:—*Hellmuth, K.C.*, and *Moss, K.C.*, for the appellants; *Newcombe, K.C.*, *Barrington-Ward* (for *R. Asquith*, serving with His Majesty's Forces), and *G. W. Mason*, for the respondents; *Sir R. Finlay, K.C.*, *Nesbitt, K.C.*, *Lafleur, K.C.*, *Geoffrion, K.C.*, and *Hon. M. Macnaghten* (for *G. Lawrence*, serving with His Majesty's Forces), for the Attorneys-General for Ontario, Quebec, Nova Scotia, and New Brunswick; *Lanctot, K.C.*, for the Attorney-General for Quebec; *Parlee, K.C.*, and *H. Douglas* (for *Sir H. Greenwood*, serving with His Majesty's Forces), for the Attorney-General for Alberta; *Bayly, K.C.*, for the Attorney-General for Ontario; *H. Douglas*, for the Attorney-General for British Columbia; all the above Attorneys-General for provinces being interveners.

In *Attorney-General for Ontario* v. *Attorney-General for Canada* the appellant and the intervening Attorneys-General for provinces were represented as above stated, and there also appeared:—*Newcombe, K.C.*, and *Barrington-Ward*, for the respondent Attorney-General for Canada; *Wegenast*, for the interveners the Canadian Manufacturers Association.

In the following note of the argument only those counsel who addressed the Board are mentioned.

1915. Dec. 10, 13, 14, 15, 16, 17. *Sir R. Finlay*, *K.C.*, and *Nesbitt*, *K.C.*, for the Attorneys-General for the provinces above stated, appellants and interveners; *Hellmuth*, *K.C.*, and *Moss*, *K.C.*, for the appellants, the Bonanza Creek Gold Mining Company. Even if the Bonanza Creek Company had not power under their letters patent of incorporation to hold land or to mine in the Yukon, the Crown recognized the right and title of the company as complete against the Crown by (1.) the grant of a free miner's certificate, (2.) the grant of a licence under the Foreign Companies Ordinance, and (3.) the grant of the lease of March 16, 1907, with the acceptance of rent thereunder. The Crown had power under the Foreign Companies Ordinance to grant licences to companies which otherwise had no power to mine in the Yukon. For the reasons given by Duff J. in the Supreme Court the appellants were incorporated under a "Canadian charter" within the meaning of the placer mining regulations and consequently were entitled to hold a free miner's certificate. The acts of the Crown cure all defects; its grant of the licence and lease amounted to a new incorporation for the purpose of the grant: Thompson on Corporations, 2nd ed., vol. 1, p. 269; *Comanche County* v. *Lewis*. (1) There is to be implied a new incorporation by the Crown in the right of the Dominion, and the validity of this incorporation depends upon the law in the Yukon, not upon that in Ontario. Turning to the more general question of the provincial power under s. 92, head (11.), of the British North America Act, 1867, to legislate for the incorporation of companies "with provincial objects," the effect of that enumeration is that a provincial Legislature can only confer upon a company the right to carry on its business in the province, but the corporation which it creates has the capacity, as a legal entity, to carry on business in any province or country which allows it to do so. The personality of a corporation is recognized in foreign countries by comity of nations: Bar's Private International Law (Gillespie's translation), 2nd ed., p. 227; the same principle applies between the provinces. The decision in *Ashbury Railway Carriage and Iron Co.*

(1) (1889) 133 U. S. 198, 202.

J. C.
1916
BONANZA CREEK GOLD MINING COMPANY, LIMITED v. REX.

v. *Riche* (1) turned upon the words of the English Companies Act, 1862, and does not apply to an incorporation by letters patent. The British North America Act, 1867, by ss. 12 and 65 transferred to the Lieutenant-Governor of Ontario the prerogative power of incorporation in relation to that province previously existing under the Companies Act, 1864 (27 & 28 Vict. c. 23, Province of Canada). The effect of the Ontario Companies Act (R. S. Ont., 1897, c. 191), s. 9, under which the Bonanza Company received its charter, is that the Lieutenant-Governor can incorporate only for a purpose comprised in s. 92, head (11.), but the corporate body so created has all the capacity of a common law corporation: see per Lord Blackburn in *Riche* v. *Ashbury Railway Carriage and Iron Co.* (2) in the Exchequer Chamber. [*Liquidators of the Maritime Bank of Canada* v. *Receiver-General of New Brunswick* (3) was also referred to.] If an Ontario company has not the capacity to exercise its objects in other provinces, by comity of those provinces, neither has a Dominion company capacity to do so outside the Dominion, for s. 5 of the Companies Act of Canada (R. S. Can., 1906, c. 79) is in the same language as s. 9 of the Ontario Companies Act.

Further, the words " with provincial objects " in s. 92, head (11.), mean with objects other than those as to which the Dominion has express powers (e.g., banking). The words do not impose a territorial limit upon the exercise of the objects. The similar words " for provincial purposes " in s. 92, head (9.), clearly do not preclude taxation for expenditure outside the province—for example, for the maintenance of agents-general. A provincial Legislature could incorporate a company to promote in Great Britain emigration into the province; that would be a provincial object, but would be excluded by the territorial limitation. [*Canadian Pacific Railway* v. *Ottawa Fire Insurance Co.* (4), *Colonial Building and Investment Association* v. *Attorney-General of Quebec* (5), *Dobie* v. *Temporalities Board* (6), and *La Compagnie Hydraulique de St. François* v. *Continental Heat and Light Co.* (7) were referred to.] Since 1867 the Dominion Government has recognized that provincial

(1) L. R. 7 H. L. 653.
(2) (1874) L. R. 9 Ex. 224, 263.
(3) [1892] A. C. 437, 442.
(4) (1907) 39 Can. S. C. R. 405.
(5) (1883) 9 App. Cas. 157.
(6) (1882) 7 App. Cas. 136.
(7) [1909] A. C. 194.

companies have capacity outside the province of incorporation. A very large part of the business of Canada is done by provincial companies trading outside their province of incorporation. An application of the territorial limitation would have serious effects, which cannot satisfactorily be bridged by the doctrine of ancillary powers. If the meaning of s. 92, head (11.), is doubtful, the Board should hesitate to adopt a construction which would give rise to great inconveniences in trade.

Newcombe, K.C., and *G. W. Mason*, for the respondent. The appellants the Bonanza Creek Company were not entitled to mine in the Yukon Territory, (1.) because the province of Ontario had power only to incorporate companies with provincial objects; (2.) because they were not competent to hold a free miner's certificate. The latter reason is dealt with first. The placer mining regulations (1 Edw. 7, p. xlix.) define a joint stock company to which a certificate may be granted as "any company incorporated for mining purposes under a Canadian charter or licensed by the Government of Canada." A Canadian charter means a charter granted under Dominion powers. This appears from the alternative licence referred to. Further, all public land, including mines, in the Yukon vested in the Crown in the right of the Dominion, and the regulations were made under the Dominion Lands Act (R. S. Can., 1886, c. 54), s. 47, as amended by 55 & 56 Vict. (Can.) c. 15, s. 5. The intention was that the local Legislatures should have no power to legislate in the matter. The Dominion statute 61 Vict. c. 49, which empowered the Secretary of State to grant to mining companies powers to mine in the Yukon, expressly applies only to companies incorporated in the United Kingdom and in foreign countries. The licence granted under the Foreign Companies Ordinance could not make good the inherent want of capacity in the appellants. The holding of a valid free miner's certificate was a condition precedent to the validity of the leases. Both the certificate and the licence were issued under taxing enactments; they do not amount to a recognition by the Crown of the appellants' right to mine in the Yukon.

The contention that the exercise of the prerogative power by the letters patent conferred capacity outside the province was not advanced in the Courts in Canada and is invalid. Sect. 65 of the

J. C. 1916

BONANZA CREEK GOLD MINING COMPANY, LIMITED v. REX.

British North America Act, 1867, only preserves in the Lieutenant-Governor those prerogative powers which are capable of being exercised in relation to the Government of Ontario, and by s. 92, head (11.), the only powers which are capable of being so exercised in relation to the incorporation of companies are limited to the incorporation of companies with provincial objects. The Act effects a division of the executive powers between the Governor-General and the Lieutenant-Governors of Ontario and Quebec; the only key to the limits of their respective authorities is furnished by ss. 91 and 92. The Ontario Companies Act, s. 9, merely delegates to the Lieutenant-Governor the provincial powers of the Legislature; the corporation created under s. 9 is further described by ss. 4, 25, 102, and 105. The principle of *Ashbury Railway Carriage and Iron Co.* v. *Riche* (1) applies and is fatal to the argument based upon capacity outside the province. [*London County Council* v. *Attorney-General* (2) and *Attorney-General* v. *Great Eastern Ry. Co.* (3) were also referred to.] Recognition by comity can only be to the extent of the powers of the corporation: *Canadian Southern Ry. Co.* v. *Gebhard* (4); *Colquhoun* v. *Heddon.* (5) The intention of s. 92 was to confer purely local powers: *Prohibition Case.* (6) The Ontario Legislature is not incorporating a company with provincial objects if the effect is to give it capacity in another province; the capacity to mine in a province is a matter of civil rights in that province. *Dobie* v. *Temporalities Board* (7) shows that the provinces by joint action cannot effect a legislative object assigned to the Dominion Legislature. The word "objects" in s. 92, head (11.), has the same meaning as in a memorandum of association, namely, the things to do which the company is incorporated. Mining as an object can only be a provincial object by its exercise being limited to a province, and the province must be that which incorporates the company.

Wegenast, for the Canadian Manufacturers Association. A provincial company is not inherently incapable of entering into transactions incidental to its objects outside the incorporating

(1) L. R. 7 H. L. 653.
(2) [1902] A. C. 165.
(3) (1880) 5 App. Cas. 473.
(4) (1883) 109 U. S. 527.
(5) (1890) 24 Q. B. D. 491.
(6) [1896] A. C. 348, 363.
(7) 7 App. Cas. 136.

province. In considering what it validly may do outside the province the distinction is between powers and transactions, not between functional and ancillary powers.

Sir R. Finlay, K.C., replied.

1916. Feb. 24. The judgment of their Lordships was delivered by

VISCOUNT HALDANE. This is an appeal from a judgment of the Supreme Court of Canada in a petition of right which gave rise to questions of constitutional importance as to the position of joint stock companies, incorporated within the provinces, but seeking to carry on their business beyond the provincial boundaries.

The appellants were incorporated in Ontario by letters patent dated December 23, 1904, and issued under the authority of the Ontario Companies Act, and by virtue of any other authority or power then existing, in the name of the Sovereign and under the Great Seal of the province, by its Lieutenant-Governor. The letters patent recite that this Act authorizes the Lieutenant-Governor in Council by letters patent under the Great Seal to create and constitute bodies corporate and politic for any of the purposes or objects to which the legislative authority of the province extends. They go on to incorporate the company to carry on the businesses of mining and exploration in all their branches, and to acquire real and personal property, including mining claims, with incidental powers. There are no words which limit the area of operation or prohibit the company from carrying out its objects beyond the provincial boundaries.

In the years 1899 and 1900 the Crown, through the Minister of the Interior of the Dominion, had granted to predecessors in title of the appellants leases of certain tracts of land, in what is now the Yukon district, for the purpose of hydraulic mining. Two of these leases contained exclusions of so much of the tracts as had been taken up and entered for placer mining claims. In the year 1900 the Crown entered into agreements with these predecessors in title to the effect that, if any of the placer mining claims within the tracts should be forfeited or surrendered, the Crown would include them in the tracts by supplementary leases. The original leases having subsequently been assigned to the appellants, and certain of the placer mining claims having reverted, the Crown

J. C. 1916 BONANZA CREEK GOLD MINING COMPANY, LIMITED v. REX.

purported in 1907 to demise to the appellants these claims, and to agree to demise to them such other of the claims as might thereafter revert for the same terms of years as those for which the original leases were granted.

In 1906 the Minister of the Interior of the Dominion had purported to issue to the appellants a free miner's certificate. This certificate was issued in conformity with certain regulations under an Order in Council made under the provisions of the Dominion Lands Act, which gives the right to a free miner's certificate to persons of over eighteen and to joint stock companies, the latter being defined to include any company incorporated "for mining purposes under a Canadian charter or licensed by the Government of Canada."

When the Yukon district was, by the statute passed by the Dominion Parliament in 1899, made a separate territory, power to make ordinances was conferred on the Commissioner of the territory. Under this power the Foreign Companies Ordinance was passed, under which any company, incorporated otherwise than by or under the authority of an ordinance of the territory or an Act of the Parliament of Canada, was required to obtain a licence under the ordinance to carry on its business in the Yukon territory. Such a licence when issued was made sufficient evidence in the Courts of the territory of the due licensing of the company. In September, 1905, the appellants obtained such a licence.

In 1908 the appellants presented a petition of right in the Exchequer Court of Canada, alleging that, in breach of the agreement entered into by the Crown, placer mining claims which had reverted to the Crown and should have been leased to the appellants had been wrongfully withheld from the appellants, and that by reason of this and of other breaches of the agreement the appellants had suffered heavy damage, for which they as suppliants prayed compensation. The respondent delivered an answer to the petition of right, the first two paragraphs of such answer being as follows: "1. The respondent denies that the suppliant has now or ever has had the power, either under letters patent, licence, free miner's certificate, or otherwise, to carry on the business of mining in the district of the Yukon, or to acquire any mines, mining claims, or mining locations therein, or any estate or interest by way of lease or otherwise in any such mines, mining claims, or locations. 2. Should

a free miner's certificate have been issued to the suppliant, the respondent claims that the same is and always has been invalid and of no force or effect, that there was no power to issue a free miner's certificate to the suppliant, a company incorporated under provincial letters patent, and that there was no power vested in the suppliant to accept such a certificate."

Cassels J., the judge of the Exchequer Court, ordered the questions of law raised by these paragraphs of the answer to be disposed of, and pending this stayed all other proceedings. He subsequently heard arguments upon the questions thus raised. As the result he decided that he ought to follow what he conceived to be the opinions given by the majority of the judges of the Supreme Court of Canada in a general reference which had been made to them in regard to companies, opinions which are now before this Board for consideration in the appeal which was argued immediately after the present one. He thought that the majority in the Supreme Court had decided that a provincial company was confined in the exercise of its functions to the province where it was incorporated. He therefore dismissed the petition of right, but without costs, on the ground taken in the first of the above quoted paragraphs of the answer. On the narrower ground taken in the second paragraph he did not enter.

There was an appeal to the Supreme Court, and the learned judges were divided in their views. The Chief Justice, Davies J., and Duff J. were of opinion that it was ultra vires of the appellants to exercise powers or to acquire rights outside the boundaries of the province of Ontario. Idington J. and Anglin J. were of a different opinion. They held that, while a provincial company could exercise its powers as of right only within the province where it was incorporated, it was elsewhere in Canada like a foreign company, and had capacity to accept rights and powers conferred on it by comity by another Government.

The majority in the Supreme Court were therefore adverse to the appellants on the first question raised, that as to general capacity. On the question raised by the second paragraph of the answer Duff J. expressed an opinion in favour of the appellants. On the question, which was one of construction, and arose only if he was wrong in his answer to the wider question, he thought that the condition of acquiring, under the Dominion regulations approved by the

J. C.
1916
BONANZA CREEK GOLD MINING COMPANY, LIMITED v. REX.

Order in Council already referred to, the right to a mining location to be worked by hydraulic process was the obtaining a free miner's certificate under the Dominion regulations governing placer mining. Under these regulations a joint stock company might receive such a certificate, if it came within the definition of being "incorporated for mining purposes under a Canadian charter, or licensed by the Government of Canada." Differing from the Chief Justice, who had been adverse to the appellants on this point also, Duff J. was of opinion that the expression "Canadian charter" meant, not a charter granted under Dominion authority, but one emanating from any lawful authority in Canada. Otherwise, as he pointed out, a company incorporated by Yukon authority, or by the Council of the North-West Territories before Yukon became a separate territory, would be excluded, along with companies incorporated by the province of Canada before confederation.

Their Lordships have come to the same conclusion on this point as Duff J. They think that the appellants, if they possessed legal capacity to receive such a Dominion certificate, had it validly bestowed on them, and that, if so, they subsequently obtained a good title to the mining locations and also to the Yukon licence to carry on business which was granted to them. This subordinate question ought therefore to be answered in favour of the appellants.

Their Lordships accordingly turn to the larger question raised by the first of the two paragraphs, a question which is of far-reaching importance. It is whether a company incorporated by provincial letters patent, issued in conformity with legislation under s. 92 of the British North America Act, can have capacity to acquire and exercise powers and rights outside the territorial boundaries of the province. In the absence of such capacity the certificates, licences, and leases already referred to were wholly inoperative, for if the company had no legal existence or capacity for purposes outside the boundaries of the province conferred on it by the Government of Ontario, by whose grant exclusively it came into being, it is not apparent how any other Government could bestow on it rights and powers which enlarged that existence and capacity. The answer to this question must depend on the construction to be placed on s. 92 of the British North America Act and on the Ontario Companies Act.

Sect. 92 confers exclusive power upon the provincial Legislature to make laws in relation to the incorporation of companies with provincial objects. The interpretation of this provision which has been adopted by the majority of the judges in the Supreme Court is that the introduction of the words "with provincial objects" imposes a territorial limit on legislation conferring the power of incorporation so completely that by or under provincial legislation no company can be incorporated with an existence in law that extends beyond the boundaries of the province. Neither directly by the language of a special Act, nor indirectly by bestowal through executive power, do they think that capacity can be given to operate outside the province, or to accept from an outside authority the power of so operating. For the company, it is said, is a pure creature of statute, existing only for objects prescribed by the Legislature within the area of its authority, and is therefore restricted, so far as legal capacity is concerned, on the principle laid down in *Ashbury Railway Carriage and Iron Co.* v. *Riche.* (1)

Their Lordships, however, take the view that this principle amounts to no more than that the words employed to which a corporation owes its legal existence must have their natural meaning, whatever that may be. The words of the British Companies Act were construed as importing that a company incorporated by the statutory memorandum of association which the Act prescribes could have no legal existence beyond such as was required for the particular objects of incorporation to which that memorandum limited it. A similar rule has been laid down as regards companies created by special Act. The doctrine means simply that it is wrong, in answering the question what powers the corporation possesses when incorporated exclusively by statute, to start by assuming that the Legislature meant to create a company with a capacity resembling that of a natural person, such as a corporation created by charter would have at common law, and then to ask whether there are words in the statute which take away the incidents of such a corporation. This was held by the House of Lords to be the error into which Blackburn J. and the judges who agreed with him had fallen when they decided in *Riche* v. *Ashbury Railway Carriage and Iron Co.* (2) in the Court below that the analogy of the status and

(1) L. R. 7 H. L. 653. (2) L. R. 9 Ex. 224.

J. C.
1916
BONANZA CREEK GOLD MINING COMPANY, LIMITED v. REX.

powers of a corporation created by charter, as expounded in the *Sutton's Hospital Case* (1), should in the first instance be looked to. For to look to that analogy is to assume that the Legislature has had a common law corporation in view, whereas the wording may not warrant the inference that it has done more than concern itself with its own creature. Such a creature, where its entire existence is derived from the statute, will have the incidents which the common law would attach if, but only if, the statute has by its language gone on to attach them. In the absence of such language they are excluded, and if the corporation attempts to act as though they were not, it is doing what is ultra vires and so prohibited as lying outside its existence in contemplation of law. The question is simply one of interpretation of the words used. For the statute may be so framed that executive power to incorporate by charter, independently of the statute itself, which some authority, such as a Lieutenant-Governor, possessed before it came into operation, has been left intact. Or the statute may be in such a form that a new power to incorporate by charter has been created, directed to be exercised with a view to the attainment of, for example, merely territorial objects, but not directed in terms which confine the legal personality which the charter creates to existence for the purpose of these objects and within territorial limits. The language may be such as to show an intention to confer on the corporation the general capacity which the common law ordinarily attaches to corporations created by charter. In such a case a construction like that adopted by Blackburn J. will be the true one.

Applying the principle so understood to the interpretation of s. 92 and of the Ontario Companies Act passed by virtue of it, the conclusion which results is different from that reached by the Court below. For the words of s. 92 are, in their Lordships' opinion, wide enough to enable the Legislature of the province to keep the power alive, if there existed in the Executive at the time of confederation a power to incorporate companies with provincial objects, but with an ambit of vitality wider than that of the geographical limits of the province. Such provincial objects would be of course the only objects in respect of which the province could confer actual rights. Rights outside the province would have to be derived

(1) (1613) 10 Rep. 1a.

from authorities outside the province. It is therefore important to ascertain what were the powers in this regard of a Lieutenant-Governor before the British North America Act passed, and in the second place what the Ontario Companies Act has really done.

The Act which was passed by the Imperial Parliament in 1840 (1), in consequence of the report on the state of affairs in Canada made by Lord Durham, united the provinces of Upper and Lower Canada under a Governor-General, who had power to appoint deputies to whom he could delegate his authority. This Act established a single Legislature for the new United Province of Canada, and shortly after it had passed responsible government was there set up. In 1867 the British North America Act modified the Constitution so established. This Act contained a preamble stating that the provinces of Canada, Nova Scotia, and New Brunswick had expressed their desire to be federally united into one Dominion under the Crown, with a Constitution similar in principle to that of the United Kingdom. In the case of *Attorney-General for the Commonwealth of Australia* v. *Colonial Sugar Refining Co.* (2) this Board had occasion to comment on the contrast between the principles which underlie the distribution of powers in the Constitutions of Canada and Australia respectively. They drew attention to the fact that the expression " federal " in the preamble of the British North America Act had been used in a somewhat loose fashion, and that the principle actually adopted was not that of federation in the strict sense, but one under which the Constitutions of the provinces had been surrendered to the Imperial Parliament for the purpose of being refashioned. The result had been to establish wholly new Dominion and provincial Governments with defined powers and duties, both derived from the statute which was their legal source, the residual powers and duties being taken away from the old provinces and given to the Dominion. It is to be observed that the British North America Act has made a distribution between the Dominion and the provinces which extends not only to legislative but to executive authority. The executive government and authority over Canada are primarily vested in the Sovereign. But the statute proceeds to enact, by s. 12, that all powers, authorities,

(1) 3 & 4 Vict. c. 35. (2) [1914] A. C. 237.

J. C. 1916 BONANZA CREEK GOLD MINING COMPANY, LIMITED v. REX.

and functions which by any Imperial statute or by any statute of the provinces of Upper Canada, Lower Canada, Canada, Nova Scotia, or New Brunswick are at the Union vested in or exercisable by the respective Governors or Lieutenant-Governors of these provinces shall, "as far as the same continue in existence and capable of being exercised after the Union in relation to the government of Canada," be vested in and exercisable by the Governor-General. Sect. 65, on the other hand, provides that all such powers, authorities, and functions shall, "as far as the same are capable of being exercised after the Union in relation to the government of Ontario and Quebec respectively, be vested in and exercisable by the Lieutenant-Governors of Ontario and Quebec respectively." By s. 64 the constitution of the executive authority in Nova Scotia and New Brunswick was to continue as it existed at the Union until altered under the authority of the Act.

The effect of these sections of the British North America Act is that, subject to certain express provisions in that Act and to the supreme authority of the Sovereign, who delegates to the Governor-General and through his instrumentality to the Lieutenant-Governors the exercise of the prerogative on terms defined in their commissions, the distribution under the new grant of executive authority in substance follows the distribution under the new grant of legislative powers. In relation, for example, to the incorporation of companies in Ontario with provincial objects the powers of incorporation which the Governor-General or Lieutenant-Governor possessed before the Union must be taken to have passed to the Lieutenant-Governor of Ontario so far as concerns companies with this class of objects. Under both s. 12 and s. 65 the continuance of the powers thus delegated is made by implication to depend on the appropriate Legislature not interfering.

There can be doubt that prior to 1867 the Governor-General was for many purposes entrusted with the exercise of the prerogative power of the Sovereign to incorporate companies throughout Canada, and such prerogative power to that extent became after confederation, and so far as provincial objects required its exercise, vested in the Lieutenant-Governors, to whom provincial Great Seals were assigned as evidences of their authority. Whatever obscurity may at one time have prevailed as to the position of a Lieutenant-

Governor appointed on behalf of the Crown by the Governor-General has been dispelled by the decision of this Board in *Liquidators of the Maritime Bank of Canada* v. *Receiver-General of New Brunswick*. (1) It was there laid down that "the act of the Governor-General and his Council in making the appointment is, within the meaning of the statute, the act of the Crown; and a Lieutenant-Governor, when appointed, is as much the representative of Her Majesty for all purposes of provincial government as the Governor-General himself is for all purposes of Dominion government."

The form of the commission by which the Governor-General appoints a Lieutenant-Governor to be Lieutenant-Governor of Ontario bears this out. For it runs in the name of the Sovereign, and is "to do and execute all things that shall belong to your said command and the trust we have reposed in you, according to the several provisions and directions granted or appointed you by virtue of the Act of the United Kingdom of Great Britain and Ireland passed in the thirtieth year of the reign of Her late Majesty Queen Victoria, called and known as 'The British North America Act, 1867,' and of all other statutes in that behalf and of this our present commission, according to such instructions as are herewith given to you or which may from time to time be given to you in respect of the said province of Ontario under the sign manual of our Governor-General of our said Dominion of Canada, or by order of our Privy Council of Canada, and according to such laws as are or shall be in force in the said province of Ontario."

Their Lordships have now to consider the question whether legislation before or after confederation has been of such a character that any power of incorporation by charter from the Crown which formerly existed has been abrogated or interfered with to such an extent that companies so created no longer possess that capacity which the charter would otherwise have attached to them.

Prior to confederation, the granting of letters patent under the Great Seal of the province of Canada for the incorporation of companies for manufacturing, mining, and certain other purposes was sanctioned and regulated by the Canadian statute of 1864. (2) This statute authorized the Governor in Council to grant a charter

(1) [1892] A. C. 437, 443. (2) 27 & 28 Vict. c. 23 Province of Canada).

J. C. 1916 BONANZA CREEK GOLD MINING COMPANY, LIMITED v. REX.

of incorporation to persons who should petition for incorporation for the purposes of the enumerated kinds of business. Applicants for such a charter were to give notice in the *Canada Gazette* of, among other things, the object or purpose for which incorporation was sought. By s. 4 every company so incorporated under that Great Seal for any of the purposes mentioned in this Act was to be a body corporate capable of exercising all the functions of an incorporated company as if incorporated by a special Act of Parliament. Their Lordships construe this provision as an enabling one, and not as intended to restrict the existence of the company to what can be found in the words of the Act as distinguished from the letters patent granted in accordance with its provisions. It appears to them that the doctrine of *Ashbury Railway Carriage and Iron Co.* v. *Riche* (1) does not apply where, as here, the company purports to derive its existence from the act of the Sovereign and not merely from the words of the regulating statute. No doubt the grant of a charter could not have been validly made in contravention of the provisions of the Act. But, if validly granted, it appears to their Lordships that the charter conferred on the company a status resembling that of a corporation at common law, subject to the restrictions which are imposed on its proceedings. There is nothing in the language used which, for instance, would preclude such a company from having an office or branch in England or elsewhere outside Canada.

The Dominion Companies Act (c. 79 of the Revised Statutes of 1906) is, so far as Part I. is concerned, framed on the same principle, although the machinery set up is somewhat different. Part II. stands on another footing. This part deals only with companies directly incorporated by special Act of the Parliament of Canada, and to these it is obvious that other considerations may apply. But the companies to which Part I. applies are, like those under the old statute, to be incorporated by letters patent, the only material difference being that the Act enables these to be granted by the Secretary of State under his own seal of office. When granted by s. 5 they constitute the shareholders a body corporate and politic for any of the purposes or objects, with certain exceptions, to which the legislative authority of the Parliament of Canada extends. The

(1) L. R. 7 H. L. 653.

Sovereign, through the medium of the Governor-General, in this way delegates the power of incorporation, subject to restrictions on its exercise, to the Secretary of State, and it is by the exercise of the executive power of the Sovereign that the company is brought into existence.

The Ontario Companies Act, which governs the present case, is c. 191 of the Revised Statutes of the province, 1897. The principle is similar, save that the letters patent are to be granted directly by the Lieutenant-Governor of the province under the Great Seal of Ontario. Excepting in this respect, the provisions of s. 9, which corresponds to s. 5 of the Dominion Act, are substantially the same as those of the latter section, so that, subject to the express restrictions in the statute, it is by the grant under the Great Seal and not by the words of the statute, which merely restrict the cases in which such a grant can be made, that the vitality of the corporation is to be measured. It will be observed that s. 107 enables an extra-provincial company desiring to carry on business within the province of Ontario to do so if authorized by licence from the Lieutenant-Governor, a provision which bears out the view indicated.

It was obviously beyond the powers of the Ontario Legislature to repeal the provisions of the Act of 1864, excepting in so far as the British North America Act enabled it to do this in matters relating to the province. If the Legislature of Ontario had not interfered the general character of an Ontario company constituted by grant would remain similar to that of a Canadian company before confederation.

The whole matter may be put thus: The limitations of the legislative powers of a province expressed in s. 92, and in particular the limitation of the power of legislation to such as relates to the incorporation of companies with provincial objects, confine the character of the actual powers and rights which the provincial Government can bestow, either by legislation or through the Executive, to powers and rights exercisable within the province. But actual powers and rights are one thing and capacity to accept extra-provincial powers and rights is quite another. In the case of a company created by charter the doctrine of ultra vires has no real application in the absence of statutory restriction added to

J. C.
1916
BONANZA CREEK GOLD MINING COMPANY, LIMITED v. REX.

what is written in the charter. Such a company has the capacity of a natural person to acquire powers and rights. If by the terms of the charter it is prohibited from doing so, a violation of this prohibition is an act not beyond its capacity, and is therefore not ultra vires, although such a violation may well give ground for proceedings by way of scire facias for the forfeiture of the charter. In the case of a company the legal existence of which is wholly derived from the words of a statute, the company does not possess the general capacity of a natural person and the doctrine of ultra vires applies. Where, under legislation resembling that of the British Companies Act by a province of Canada in the exercise of powers which s. 92 confers, a provincial company has been incorporated by means of a memorandum of association analogous to that prescribed by the British Companies Act, the principle laid down by the House of Lords in *Ashbury Railway Carriage and Iron Co.* v. *Riche* (1), of course, applies. The capacity of such a company may be limited to capacity within the province, either because the memorandum of association has not allowed the company to exist for the purpose of carrying on any business outside the provincial boundaries, or because the statute under which incorporation took place did not authorize, and therefore excluded, incorporation for such a purpose. Assuming, however, that provincial legislation has purported to authorize a memorandum of association permitting operations outside the province if power for the purpose is obtained ab extra, and that such a memorandum has been registered, the only question is whether the legislation was competent to the province under s. 92. If the words of this section are to receive the interpretation placed on them by the majority in the Supreme Court the question will be answered in the negative. But their Lordships are of opinion that this interpretation was too narrow. The words "legislation in relation to the incorporation of companies with provincial objects" do not preclude the province from keeping alive the power of the Executive to incorporate by charter in a fashion which confers a general capacity analogous to that of a natural person. Nor do they appear to preclude the province from legislating so as to create, by or by virtue of statute, a corporation with this

(1) L. R. 7 H. L. 653.

general capacity. What the words really do is to preclude the grant to such a corporation, whether by legislation or by executive act according with the distribution of legislative authority, of powers and rights in respect of objects outside the province, while leaving untouched the ability of the corporation, if otherwise adequately called into existence, to accept such powers and rights if granted ab extra. It is, in their Lordships' opinion, in this narrower sense alone that the restriction to provincial objects is to be interpreted. It follows, as the Ontario Legislature has not thought fit to restrict the exercise by the Lieutenant-Governor of the prerogative power to incorporate by letters patent with the result of conferring a capacity analogous to that of a natural person, that the appellant company could accept powers and rights conferred on it by outside authorities.

The conclusions at which their Lordships have thus arrived are sufficient to enable them to dispose of this appeal; for, according to these conclusions, the appellant company had a status which enabled it to accept from the Dominion authorities the right of free mining, and to hold the leases in question and take the benefit of the agreements relating to the locations in the Yukon district, as well as of the licence from the Yukon authorities.

A yet larger view of the devolution and distribution of executive power in Canada was suggested in some of the arguments addressed to their Lordships from the Bar, and they are aware that this view has been contended for on former occasions in the Dominion. It has been urged in several cases which have occurred that the Governor-General and the Lieutenant-Governors of the provinces, excepting so far as the Royal prerogatives have been reserved expressly or by necessary implication, have the right to exercise them, as though by implication completely handed over and distributed in such a fashion as to cover the whole of the fields to which the self-government of Canada extends. The Governor and the Lieutenant-Governors would thus be more nearly viceroys than representatives of the Sovereign under the restrictions explained in *Musgrave* v. *Pulido* (1), where it was laid down that, in the case of a Crown Colony, the commission of the Governor must in each case

(1) (1879) 5 App. Cas. 102.

J. C. 1916 BONANZA CREEK GOLD MINING COMPANY, LIMITED v. REX.

be the measure of his executive authority, a principle which, in such a case as that of a self-governing Dominion like Canada, might find its analogy in the terms not only of the commission but of the statute creating the Constitution.

The argument for the larger view concedes that it is the general rule in the construction of statutes that the Crown is not affected unless there be words to that effect, inasmuch as the law made by the Crown with the assent of the Lords and Commons is enacted prima facie for the subject and not for the Sovereign. But this principle of construction it is said cannot apply to an Act the expressed object of which is to grant a Constitution with full legislative and executive powers. In the case of such an Act there is therefore no presumption that the general provisions it contains were not intended to include any matter of prerogative which, in the absence of the rule of construction above stated, would fall within the general words employed. For a Constitution, granted to a dominion for regulating its own affairs in legislation and government generally, cannot be created without dealing with the prerogative, and the British North America Act from beginning to end deals with matters of prerogative, for the most part without expressly naming the Sovereign.

If this argument were well founded it would afford a short cut to the solution of the question which has arisen in this appeal. For under the distribution of the prerogative which it assumes it would be difficult to see how a Lieutenant-Governor, placed in the position of a viceroy as regards matters pertaining to the government of his province, could be excluded from the prerogative power of incorporating by charter, unless that power had been expressly taken away by legislation.

But their Lordships abstain from discussing at length the question so raised. They will only say that when, if ever, it comes to be argued points of difficulty will have to be considered. There is no provision in the British North America Act corresponding even to s. 61 of the Australian Commonwealth Act, which, subject to the declaration of the discretionary right of delegation by the Sovereign in ch. 1, s. 2, provides that the executive power, though declared to be in the Sovereign, is yet to be exercisable by the Governor-General. Moreover, in the Canadian Act there are various significant

sections, such as s. 9, which declares the executive government and authority over Canada to continue and be vested in the Sovereign; s. 14, which declares the power of the Sovereign to authorize the Governor-General to appoint deputies; s. 15, which, differing from s. 68 of the Commonwealth Act, says that the command in chief of the naval and military forces in Canada is to be deemed to continue and be vested in the Sovereign; and s. 16, which says that, until the Sovereign otherwise directs, the seat of the Government in Canada shall be Ottawa. These and other provisions of the British North America Act appear to preserve prerogative rights of the Crown which would pass if the scheme were that contended for, and to negative the theory that the Governor-General is made a viceroy in the full sense, and they point to the different conclusion that for the measure of his powers the words of his commission and of the statute itself must be looked to. In the case of *Liquidators of the Maritime Bank of Canada* v. *Receiver-General of New Brunswick* (1), already referred to, it was said by this Board that the provisions of the Act "nowhere profess to curtail in any respect the rights and privileges of the Crown, or to disturb the relations then subsisting between the Sovereign and the provinces." Properly understood, and subject to such express provisions of the Act as transfer what would otherwise remain prerogative powers, their Lordships are disposed to agree with this interpretation. It is quite consistent with it to hold that executive power is in many situations which arise under the statutory Constitution of Canada conferred by implication in the grant of legislative power, so that where such situations arise the two kinds of authority are correlative. It follows that to this extent the Crown is bound and the prerogative affected. But such a conclusion is a very different one from the far-reaching principle contended for in the argument in question.

For the reasons which they have assigned earlier in this judgment their Lordships will humbly advise His Majesty that this appeal should be allowed, and that the trial of the petition of right should be proceeded with. As these are proceedings arising out of a petition of right with reference to which, under the Petition of Right Act of Canada, there is discretion to award costs as against the

(1) [1892] A. C. 437.

J. C. 1916

BONANZA CREEK GOLD MINING COMPANY, LIMITED v. REX.

Crown, the respondent will pay the appellants' costs here and in the Courts below. There will be no order as to the costs of the interveners.

Solicitors for appellants and interveners: *Blake & Redden.*
Solicitors for respondent: *Charles Russell & Co.*

[PRIVY COUNCIL.]

J. C.* 1916

Feb. 24.

ATTORNEY-GENERAL FOR THE DOMINION OF CANADA . . . . . } APPELLANT;

AND

ATTORNEY-GENERAL FOR THE PROVINCE OF ALBERTA AND OTHERS . . . . . } RESPONDENTS;

AND

ATTORNEY-GENERAL FOR THE PROVINCE OF BRITISH COLUMBIA . . . . . } INTERVENER.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Canada—Legislative Authority of Dominion—Insurance—"Regulation of trade and commerce"—Insurance Act, 1910 (9 & 10 *Edw.* 7, *c.* 32, *Canada*), *ss.* 4, 70—*British North America Act*, 1867 (30 & 31 *Vict. c.* 3), *ss.* 91, 92.

By s. 4 of the Insurance Act, 1910, enacted by the Parliament of Canada, "In Canada, except as otherwise provided by this Act, no company or underwriters or other person shall solicit or accept any risk, or issue or deliver any receipt or policy of insurance, or grant any annuity on a life or lives, or collect or receive any premium, or inspect any risk, or adjust any loss, or carry on any business of insurance, or prosecute or maintain any suit, action or proceeding, or file any claim in insolvency relating to such business, unless it be done by or on behalf of a company or underwriters holding a licence from the Minister." Sect. 70 provided that any contravention of s. 4 should be punishable for a first offence by fine, and for a second or subsequent offence by imprisonment with hard labour:—

Held, that the above legislation was ultra vires of the Parliament of Canada, since the authority conferred by the British North America Act, 1867, s. 91, head (2.), to legislate as to "the

---

* *Present:* LORD BUCKMASTER L.C., VISCOUNT HALDANE, LORD PARKER OF WADDINGTON, and LORD SUMNER.

regulation of trade and commerce" does not extend to the regulation by a licensing system of a particular trade in which Canadians would otherwise be free to engage in the provinces, and since it could not be enacted under the general power conferred by s. 91 to legislate for the peace, order, and good government of Canada as it trenched upon the legislative authority conferred on the provinces by s. 92, head (13.), to make laws as to "civil rights in the province."

The principle illustrated by *Russell* v. *The Queen* (1882) 7 App. Cas. 829, that subjects which in one aspect come within the authority of the provincial Legislatures may in another aspect fall within the authority of the Dominion Legislature, is well established, but ought to be applied with great caution.

Held, further, that it would be competent to the Parliament of Canada, under s. 91, heads (2.) and (25.), by properly framed legislation, to prohibit an insurance company incorporated by a foreign State from carrying on business in Canada if the company did not hold a licence from the Minister, even if the business carried on was confined to a single province.

APPEAL (1), by special leave, from opinions of the Supreme Court of Canada (October 14, 1913).

The Governor-General in Council by an Order under the Supreme Court Act (R. S. Can., 1906, c. 139), s. 60, referred to that Court the two following questions: (1.) Are ss. 4 and 70 of the Insurance Act, 1910, or any or what part or parts of the said sections, ultra vires of the Parliament of Canada? (2.) Does s. 4 operate to prohibit an insurance company incorporated by a foreign State from carrying on the business of insurance within Canada if such company does not hold a licence under the said Act and if such business is confined to one province?

The terms of s. 4 of the Insurance Act, 1910, and the effect of s. 70 appear from the head-note.

The questions were argued in November, 1912, before the Supreme Court, consisting of Sir Charles Fitzpatrick C.J. and Davies, Idington, Duff, Anglin, and Brodeur JJ. On October 14, 1913, the learned judges delivered opinions (reported at 48 Can. S. C. R. 260) in the majority of which it was held that the answer to the first question was that the two sections were ultra vires, and to the

(1) The appeal was consolidated with *Attorney-General for Ontario* v. *Attorney-General for Canada*, reportedat p. 598, post. It was, however, separately argued, and a separate report will, it is thought, be more convenient.

J. C.
1916
ATTORNEY-GENERAL FOR CANADA v. ATTORNEY-GENERAL FOR ALBERTA.

second "Yes, if intra vires." The Chief Justice and Davies J. dissented, being of opinion that the questions should be answered respectively "No" and "Yes."

The following counsel appeared:—*Newcombe, K.C.*, and *Barrington-Ward* (for *R. Asquith*, serving with His Majesty's Forces), for the appellant; *Sir R. Finlay, K.C.*, *Nesbitt, K.C.*, *Geoffrion, K.C.*, and *Hon. M. Macnaghten* (for *G. Lawrence*, serving with His Majesty's Forces), for the Attorneys-General for Ontario, Quebec, and New Brunswick; *Lanctot, K.C.*, for the Attorney-General for Quebec; *Parlee, K.C.*, for the Attorneys-General for Alberta and Saskatchewan; *Bayly, K.C.*, for the Attorney-General for Ontario; all the above-named Attorneys-General being respondents; *Upjohn, K.C.*, *Bennett, K.C.*, and *Gaudet, K.C.*, for the respondents the Insurance Federation; *H. Douglas* (for *Sir H. Greenwood*, serving with His Majesty's Forces), for the intervening Attorney-General for British Columbia.

In the following report of the arguments only those counsel who addressed the Board are named.

1915. Dec. 8, 9, 10. *Newcombe, K.C.*, for the appellant. Sect. 4 has to be considered in connection with the whole Insurance Act, 1910; that Act is one regulating the trade of insurance and is within the authority conferred upon the Parliament of Canada by the British North America Act, 1867, s. 91, head (2.), to legislate for the "regulation of trade and commerce." The Canada Temperance Act, held to be valid in *Russell* v. *The Queen* (1), like the legislation now in question, affected a single trade carried on throughout Canada. In *Attorney-General for Ontario* v. *Attorney-General for the Dominion* (2), known as the *Prohibition Case*, Lord Watson, in delivering the judgment of the Board, said that the legislation in *Russell* v. *The Queen* (1) did not come within s. 91, head (2.), because its character was not regulative but prohibitive. It follows that had it been regulative legislation it would have come within that enumeration and that there is power thereunder to regulate a particular trade. Insurance is a trade: *Bristow* v. *Towers*. (3) It is referred to as a trade in Adam Smith's Wealth of

(1) 7 App. Cas. 829. (2) [1896] A. C. 348, 363.
(3) (1794) 6 T. R. 35.

Nations (bk. 5, ch. 1, part 3), it is dealt with in England by the Board of Trade, and comes within the recent Proclamations against trading with the enemy. In *Citizens Insurance Co. of Canada* v. *Parsons* (1) it was assumed that insurance was a trade. Express authority is given to the Dominion as to certain trades, banking for instance. That, however, is to give a wider power as to those trades in relation to s. 92, head (13.), than is conferred by s. 91, head (2.). A provincial Legislature cannot set up a bank to operate wholly within the province. The judgment in *John Deere Plow Co.* v. *Wharton* (2) shows that in so far as the Insurance Act, 1910, imposes regulations upon companies operating throughout the Dominion, including British and foreign companies, it was competent under s. 91, head (2.), and this would cover nearly the whole of the provisions of the Act. So far as foreign companies are concerned the Act was also within the Dominion authority under s. 91, head (25.), which refers to "aliens." In the cases in which the meaning of "trade and commerce" has been discussed, such as *Citizens Insurance Co. of Canada* v. *Parsons* (1) and *Bank of Toronto* v. *Lambe* (3), it has been suggested that the words refer to "inter-provincial trade" or "trade in matters of inter-provincial concern." Here we are dealing with trade of that character; insurance is a trade which cannot be localized. If and so far as this legislation comes within any expressly enumerated head of s. 91 it is immaterial whether it affects any of the subjects assigned to the provinces by s. 92: *Prohibition Case.* (4) If, however, the Parliament of Canada had not authority to enact the legislation under s. 91, head (2.), it had authority to do so under the general power conferred upon it by s. 91 to legislate for the peace, order, and good government of Canada. It is not now contended that the Dominion Parliament has authority under that general power to legislate so as to trench upon any of the expressly enumerated heads of s. 92. Those heads, however, are purely local in character and confer merely provincial powers: *Prohibition Case.* (4) This legislation was extra-provincial in character and related to matters of Canadian concern; it consequently was entirely outside the scope of s. 92 and fell within the general or residual power conferred by s. 91. Since 1867 both the

(1) (1881) 7 App. Cas. 96.
(2) [1915] A. C. 330.
(3) (1887) 12 App. Cas. 575.
(4) [1896] A. C. 348, 359.

J. C.
1916
ATTORNEY-GENERAL FOR CANADA v. ATTORNEY-GENERAL FOR ALBERTA.

Dominion and provincial authorities have treated insurance as being a matter within the legislative authority of the Dominion. The Parliament of Canada passed an Act dealing with insurance in 1868 (31 Vict. c. 48), and Dominion legislation upon that subject has been in force ever since. Provisions substantially the same as ss. 4 and 70 occur in the Insurance Act, 1886 (49 Vict. c. 45). After confederation the provincial authorities treated previously existing provincial legislation with regard to insurance as repealed, as the subject was within Dominion legislative powers: see, for example, R. S. Ont., 1877, vol. 2, pp. 2304, 2314.

Upjohn, K.C., for the respondents the Insurance Federation, supported the arguments for the appellant.

Sir R. Finlay, K.C., and *Geoffrion, K.C.*, for the respondents the Attorneys-General of the provinces above named. In order to appreciate the far-reaching character of s. 4 and the licence thereby required it is necessary to examine in detail the provisions of the Act. This examination shows that the Act goes far beyond the regulation of insurance and vitally affects civil rights in the provinces. A head of legislation under s. 91 in such terms as "the regulation of trade and commerce" must be given a meaning which will not virtually swallow up what is given to the provinces by s. 92, head (13.): *City of Montreal* v. *Montreal Street Railway*. (1) "Trade and commerce" does not cover a particular trade, whether carried on in one province or in each province: *Citizens Insurance Co. of Canada* v. *Parsons*. (2) In *John Deere Plow Co.* v. *Wharton* (3) the Board expressly accepted the view in the last-named case that "trade and commerce" must receive a limited interpretation. In all the cases in which the Board has considered legislation bringing "trade and commerce" into conflict with "civil rights in the provinces" the former words have been construed so as not to conflict with the latter. [*Attorney-General of Manitoba* v. *Manitoba Licence Holders Association* (4), *Bank of Toronto* v. *Lambe* (5), *Hodge* v. *The Queen* (6), and the report of the Board (7) declaring, without giving reasons, that the Liquor Licensing Act, 1883, known

(1) [1912] A. C. 333, 343.
(2) 7 App. Cas. 96, 113.
(3) [1915] A. C. 330, 340.
(4) [1902] A. C. 73, 77, 78.
(5) 12 App. Cas. 575, 586.
(6) (1883) 9 App. Cas. 117, 129.
(7) November 11, 1885. Unreported; a print of the shorthand notes of the hearing was referred to.

as the McCarthy Act, was ultra vires of the Dominion Legislature, were also referred to.] *Russell* v. *The Queen* (1) is an anomalous case; it is to be regarded as an authority, but no valid argument can be derived from it. The enumeration refers to "trade and commerce," not to "trades and commerce." *Bristow* v. *Towers* (2) is not a decision that insurance is a trade. Many insurance companies are conducted upon mutual principles and are not traders: *New York Life Insurance Co.* v. *Styles.* (3) Insurance is not commerce: *Paul* v. *Virginia* (4); *New York Life Insurance Co.* v. *Cravens.* (5) If s. 91, head (2.), covers this legislation, there is no valid reason why express power should have been given to the Dominion Legislature in the case of banking.

The legislation was not authorized under the general power to legislate for the peace, order, and good government of Canada, because it affects civil rights in the provinces. The importance of a subject-matter does not bring it within the general power so as to exclude s. 92, head (13.). This appears from the express exception introduced into s. 92, head (10), as to shipping and railways, and from the judgment in the *Prohibition Case.* (6)

Newcombe, K.C., in reply. There is no decided case which adversely affects the proposition that in its Canadian and national aspect the liquor trade may be regulated by the Dominion Legislature under s. 91, head (2.). The McCarthy Act was invalid because it related to private and local matters, not because it dealt with a particular trade. The Dominion Legislature has made laws with regard to the grain trade: see R. S. Can., 1906, cc. 65, 83, and 133. [*Attorney-General of Ontario* v. *Mercer* (7) and *Royal Bank of Canada* v. *The King* (8) were referred to.]

1916. Feb. 24. The judgment of their Lordships was delivered by

VISCOUNT HALDANE. This is an appeal from a judgment of the Supreme Court of Canada answering certain questions put to the

(1) 7 App. Cas. 829.
(2) 6 T. R. 35.
(3) (1889) 14 App. Cas. 381.
(4) (1868) 75 U. S. 168, 183.
(5) (1899) 178 U. S. 389, 401.
(6) [1896] A. C. 348.
(7) (1883) 8 App. Cas. 767.
(8) [1913] A. C. 283.

J. C.
1916
ATTORNEY-GENERAL FOR CANADA v. ATTORNEY-GENERAL FOR ALBERTA.

judges by a reference from the Government of the Dominion. The questions so referred were as follows:—

1. Are ss. 4 and 70 of the Insurance Act, 1910, or any and what part or parts of the said sections, ultra vires of the Parliament of Canada?

2. Does s. 4 of the Insurance Act, 1910, operate to prohibit an insurance company incorporated by a foreign State from carrying on the business of insurance within Canada, if such company does not hold a licence from the Minister under the said Act, and if such carrying on of the business is confined to a single province?

Sect. 4 is in these terms: "In Canada, except as otherwise provided by this Act, no company or underwriters or other person shall solicit or accept any risk, or issue or deliver any receipt or policy of insurance, or grant any annuity on a life or lives, or collect or receive any premium, or inspect any risk, or adjust any loss, or carry on any business of insurance, or prosecute or maintain any suit, action, or proceeding, or file any claim in insolvency relating to such business, unless it be done by or on behalf of a company or underwriters holding a licence from the Minister." The Minister is defined in the Act to mean the Minister of Finance of the Dominion.

Sect. 70 is an ancillary section which imposes a penalty on every person who contravenes or attempts to contravene the provisions of the above and other sections. Sect. 3 provides that the provisions of the Act shall not apply to any contract of marine insurance effected in Canada by any company authorized to carry on such business within Canada, nor to any company incorporated by an Act of the late province of Canada, or by an Act of the Legislature of any province now forming part of Canada, which carries on the business of insurance wholly within the limits of the province by the Legislature of which it was incorporated, and which is within the exclusive control of the Legislature of such province. Sect. 3 also provides that any such company as is last described may, by leave of the Governor in Council, avail itself of the provisions of this Act on complying with the provisions thereof, and that if it so avails itself these provisions shall then apply to it, and such company shall thereafter have the power of transacting its business of insurance throughout Canada. Sect. 12 enacts that no licence shall

be granted to any individual underwriter or underwriters to carry on any kind of insurance business, excepting in the case of associations of individuals formed upon the plan known as Lloyd's, under which each associate underwriter becomes liable for a proportionate part of the whole amount insured by a policy. The Act contains other restrictive and regulative provisions.

It will be observed that s. 4 deprives private individuals of their liberty to carry on the business of insurance, even when that business is confined within the limits of a province. It will also be observed that even a provincial company operating within the limits of the province where it has been incorporated cannot, notwithstanding that it may obtain permission from the authorities of another province, operate within that other province without the licence of the Dominion Minister. In other words, the capacity is interfered with which, according to the judgment just delivered by their Lordships in the case of the Bonanza Company (1), such a company possesses to take advantage of powers and rights proffered to it by authorities outside the provincial limits. Such an interference with its status appears to their Lordships to interfere with its civil rights within the province of incorporation, as well as with the power of the Legislature of every other province to confer civil rights upon it. Private individuals are likewise deprived of civil rights within their provinces.

It must be taken to be now settled that the general authority to make laws for the peace, order, and good government of Canada, which the initial part of s. 91 of the British North America Act confers, does not, unless the subject-matter of legislation falls within some one of the enumerated heads which follow, enable the Dominion Parliament to trench on the subject-matters entrusted to the provincial Legislatures by the enumeration in s. 92. There is only one case, outside the heads enumerated in s. 91, in which the Dominion Parliament can legislate effectively as regards a province, and that is where the subject-matter lies outside all of the subject-matters enumeratively entrusted to the province under s. 92. *Russell* v. *The Queen* (2) is an instance of such a case. There the Court considered that the particular subject-matter in question lay outside the provincial powers. What has been said in subsequent

(1) See ante, p. 566. (2) 7 App. Cas. 829.

J. C.
1916
ATTORNEY-GENERAL FOR CANADA v. ATTORNEY-GENERAL FOR ALBERTA.

cases before this Board makes it clear that it was on this ground alone, and not on the ground that the Canada Temperance Act was considered to be authorized as legislation for the regulation of trade and commerce, that the Judicial Committee thought that it should be held that there was constitutional authority for Dominion legislation which imposed conditions of a prohibitory character on the liquor traffic throughout the Dominion. No doubt the Canada Temperance Act contemplated in certain events the use of different licensing boards and regulations in different districts and to this extent legislated in relation to local institutions. But the Judicial Committee appear to have thought that this purpose was subordinate to a still wider and legitimate purpose of establishing a uniform system of legislation for prohibiting the liquor traffic throughout Canada excepting under restrictive conditions. The case must therefore be regarded as illustrating the principle which is now well established, but none the less ought to be applied only with great caution, that subjects which in one aspect and for one purpose fall within the jurisdiction of the provincial Legislatures may in another aspect and for another purpose fall within Dominion legislative jurisdiction. There was a good deal in the Ontario Liquor Licence Act, and the powers of regulation which it entrusted to local authorities in the province, which seems to cover part of the field of legislation recognized as belonging to the Dominion in *Russell* v. *The Queen*. (1) But in *Hodge* v. *The Queen* (2) the Judicial Committee had no difficulty in coming to the conclusion that the local licensing system which the Ontario statute sought to set up was within provincial powers. It was only the converse of this proposition to hold, as was done subsequently by this Board, though without giving reasons, that the Dominion licensing statute, known as the McCarthy Act, which sought to establish a local licensing system for the liquor traffic throughout Canada, was beyond the powers conferred on the Dominion Parliament by s. 91. Their Lordships think that as the result of these decisions it must now be taken that the authority to legislate for the regulation of trade and commerce does not extend to the regulation by a licensing system of a particular trade in which Canadians would otherwise be free to engage in the provinces. Sect. 4 of the statute under

(1) 7 App. Cas. 829. (2) 9 App. Cas. 117.

consideration cannot, in their opinion, be justified under this head. Nor do they think that it can be justified for any such reasons as appear to have prevailed in *Russell* v. *The Queen*. (1) No doubt the business of insurance is a very important one, which has attained to great dimensions in Canada. But this is equally true of other highly important and extensive forms of business in Canada which are to-day freely transacted under provincial authority. Where the British North America Act has taken such forms of business out of provincial jurisdiction, as in the case of banking, it has done so by express words which would have been unnecessary had the argument for the Dominion Government addressed to the Board from the Bar been well founded. Where a company is incorporated to carry on the business of insurance throughout Canada, and desires to possess rights and powers to that effect operative apart from further authority, the Dominion Government can incorporate it with such rights and powers, to the full extent explained by the decision in the case of *John Deere Plow Co.* v. *Wharton*. (2) But if a company seeks only provincial rights and powers, and is content to trust for the extension of these in other provinces to the Governments of those provinces, it can at least derive capacity to accept such rights and powers in other provinces from the province of its incorporation, as has been explained in the case of the Bonanza Company. (3)

Their Lordships are therefore of opinion that the majority in the Supreme Court were right in answering the first of the two questions referred to them in the affirmative.

The second question is, in substance, whether the Dominion Parliament has jurisdiction to require a foreign company to take out a licence from the Dominion Minister, even in a case where the company desires to carry on its business only within the limits of a single province. To this question their Lordships' reply is that in such a case it would be within the power of the Parliament of Canada, by properly framed legislation, to impose such a restriction. It appears to them that such a power is given by the heads in s. 91, which refer to the regulation of trade and commerce and to aliens. This question also is therefore answered in the affirmative.

(1) 7 App. Cas. 829. (2) [1915] A. C. 330.
(3) Ante, p. 566.

J. C. 1916 — ATTORNEY-GENERAL FOR CANADA v. ATTORNEY-GENERAL FOR ALBERTA.

Their Lordships will therefore humbly advise His Majesty that the questions referred to should be answered as now indicated. Following the usual practice, there will be no order as to costs.

Solicitors for appellant: *Charles Russell & Co.*

Solicitors for respondents: *Blake & Redden, Lawrence Jones & Co.*

Solicitors for intervener: *Gard, Lyell, Betenson & Davidson.*

[PRIVY COUNCIL.]

J. C.* 1916 — *Feb.* 24

ATTORNEY-GENERAL FOR THE PROVINCE OF ONTARIO AND OTHERS . . . . . } APPELLANTS;

AND

ATTORNEY-GENERAL FOR THE DOMINION OF CANADA . . . . . } RESPONDENT;

AND

ATTORNEY-GENERAL FOR THE PROVINCE OF BRITISH COLUMBIA . . . . . } INTERVENER.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Canada—Legislative Authority of Dominion—Legislative Authority of Provinces—Incorporation of Companies—Powers and Capacity—Insurance—British North America Act, 1867 (30 & 31 *Vict. c.* 3), *ss.* 91, 92.

Questions referred to the Supreme Court of Canada as to the power and capacity of companies incorporated under provincial legislative authority and as to the power of the provincial Legislatures to restrict the operations of companies incorporated under Dominion legislative authority answered by reference to the judgments of the Board in *John Deere Plow Co.* v. *Wharton* [1915] A. C. 330; *Bonanza Creek Gold Mining Co.* v. *The King*, ante, p. 566; and *Attorney-General for Canada* v. *Attorney-General for Alberta*, ante, p. 588.

APPEAL, by special leave, from opinions of the Supreme Court of Canada (October 14, 1913) upon a reference.

The Governor-General in Council by an Order under the Supreme

* *Present:* LORD BUCKMASTER L.C., VISCOUNT HALDANE, LORD PARKER OF WADDINGTON, and LORD SUMNER.

Court Act (R. S. Can., 1906, c. 139), s. 60, referred to that Court the following questions for hearing and consideration :—

1. What limitation exists under the British North America Act, 1867, upon the power of the provincial Legislatures to incorporate companies ?

What is the meaning of the expression " with provincial objects " in s. 92, art. 11, of the said Act ? Is the limitation thereby defined territorial, or does it have regard to the character of the powers which may be conferred upon companies locally incorporated, or what otherwise is the intention and effect of the said limitation ?

2. Has a company incorporated by a provincial Legislature under the powers conferred in that behalf by s. 92, art. 11, of the British North America Act, 1867, power or capacity to do business outside the limits of the incorporating province ? If so, to what extent and for what purpose ?

Has a company incorporated by a provincial Legislature for the purpose, for example, of buying and selling or grinding grain the power or capacity, by virtue of such provincial incorporation, to buy or sell or grind grain outside of the incorporating province ?

3. Has a corporation constituted by a provincial Legislature with power to carry on a fire insurance business, there being no stated limitation as to the locality within which the business may be carried on, power or capacity to make and execute contracts (*a*) within the incorporating province insuring property outside of the province ; (*b*) outside of the incorporating province insuring property within the province ; (*c*) outside of the incorporating province insuring property outside of the province ?

Has such a corporation power or capacity to insure property situate in a foreign country, or to make an insurance contract within a foreign country ?

Do the answers to the foregoing inquiries or any and which of them depend upon whether or not the owner of the property or risk insured is a citizen or resident of the incorporating province ?

4. If in any or all of the above-mentioned cases, (*a*), (*b*), and (*c*), the answer be negative, would the corporation have throughout Canada the power or capacity mentioned in any and which of the said cases, on availing itself of the Insurance Act, 1910 (9 & 10 Edw. 7, c. 32), s. 3, sub-s. 3 ?

J. C.
1916
ATTORNEY-GENERAL FOR ONTARIO v. ATTORNEY-GENERAL FOR CANADA.

Is the said enactment the Insurance Act, 1910 (9 & 10 Edw. 7, c. 32), s. 3, sub-s. 3, intra vires of the Parliament of Canada ?

5. Can the powers of a company incorporated by a provincial Legislature be enlarged, and to what extent, either as to locality or objects by (*a*) the Dominion Parliament; (*b*) the Legislature of another province ?

6. Has the Legislature of a province power to prohibit companies incorporated by the Parliament of Canada from carrying on business within the province unless or until the companies obtain a licence so to do from the Government of the province, or other local authority constituted by the Legislature, if fees are required to be paid upon the issue of such licences ?

For examples of such provincial legislation see Ontario, 63 Vict. c. 24 ; New Brunswick, Cons. Stats., 1903, c. 18 ; British Columbia, 5 Edw. 7, c. 11.

7. Is it competent to a provincial Legislature to restrict a company incorporated by the Parliament of Canada for the purpose of trading throughout the whole Dominion in the exercise of the special trading powers so conferred or to limit the exercise of such powers within the province ?

Is such a Dominion trading company subject to or governed by the legislation of a province in which it carries out or proposes to carry out its trading powers limiting the nature or kinds of business which corporations not incorporated by the Legislature of the province may carry on, or the powers which they may exercise within the province, or imposing conditions which are to be observed or complied with by such corporations before they can engage in business within the province ?

Can such a company so incorporated by the Parliament of Canada be otherwise restricted in the exercise of its corporate powers or capacity, and how and in what respect by provincial legislation ?

The questions were argued before the Supreme Court of Canada, consisting of Sir Charles Fitzpatrick C.J. and Davies, Idington, Duff, Anglin, and Brodeur JJ., in February, 1913.

The learned judges delivered their opinions, which are reported at 48 Can. S. C. R. 331, on October 14, 1913. It would appear that from the nature of the questions submitted and the variety of conclusions reached by the individual judges it was not possible

for the Court to return answers to the questions. The various opinions are summarized in the head-note to that report.

The Attorneys-General for the provinces appealed by special leave.

So far as the questions referred were involved in the appeal in *Bonanza Creek Gold Mining Co.* v. *The King* (1) they were argued upon the hearing of that appeal. The names of the counsel appearing are stated in the report of that appeal.

1915. Dec. 17. At the conclusion of the argument of the above mentioned appeal,

Sir R. Finlay, K.C., for the appellants, said that the arguments already adduced in the Insurance Act reference (ante, p. 588) and in the *Bonanza Co.'s Case* (1) covered all the questions which the appellants desired to argue and which had not already been dealt with by the judgment of the Board in *John Deere Plow Co.* v. *Wharton.* (2)

Newcombe, K.C., in reference to question 4 as to s. 3, sub-s. 3, of the Insurance Act, 1910, cited *Valin* v. *Langlois.* (3)

1916. Feb. 24. The judgment of their Lordships was delivered by

VISCOUNT HALDANE. Of the questions before the Board in this appeal some have already been disposed of by the judgments already delivered in the cases of *John Deere Plow Co.* v. *Wharton* (2), *Bonanza Creek Gold Mining Co.* v. *The King* (1), and the Insurance Act reference. (4) In the first of these cases, in which the judgments in the Supreme Court of Canada in the present reference were brought to their notice, their Lordships indicated that the task of answering the questions on the interpretation of the British North America Act imposed on the learned judges in the Court below was one which it was, in their own opinion, impossible satisfactorily to accomplish. They gave reasons for thinking that the abstract and general character of the questions put rendered it unsafe in the interests of justice to future suitors to attempt to answer them completely. Their Lordships are desirous of rendering all the assistance they can to the Governments of the Dominion and

(1) Ante, p. 566.
(2) [1915] A. C. 330.
(3) (1879) 5 App. Cas. 115.
(4) Ante, p. 588.

J. C.
1916
ATTORNEY-GENERAL FOR ONTARIO v. ATTORNEY-GENERAL FOR CANADA.

the provinces in the work, which is often difficult, of securing adequate assistance in the interpretation of the Constitution of Canada and the consequent framing of legislation. But, for reasons several times assigned in earlier judgments of the Judicial Committee, they feel the paramount importance of abstaining as far as possible from deciding questions such as those now stated until they come up in actual litigation about concrete disputes rather than on references of abstract propositions.

However, it so happens that on the present occasion most of the questions raised have been disposed of in the judgments in the three cases already referred to, and their Lordships will shortly indicate how far they consider this to have been done.

Questions 1 and 2 are answered as sufficiently as is expedient in the judgment given in *Bonanza Creek Gold Mining Co.* v. *The King.* (1)

Questions 3 and 4 are sufficiently disposed of by the judgments in the *Bonanza Case* (1) and *Attorney-General for Canada* v. *Attorney-General for Alberta.* (2)

As to question 5, their Lordships think it unnecessary to add to what they have said at length in the judgment in the *Bonanza Case.* (1)

As to questions 6 and 7, their Lordships have endeavoured in the case of the *John Deere Plow Co.* v. *Wharton* (3) to give as much assistance as is practicable in answering these questions. The questions are, however, in some of their developments of a highly abstract character, and the Board is of opinion that it is not prudent to go further than was done in the judgment in that case.

Their Lordships will humbly advise His Majesty that the answers to the questions brought before them on this appeal should be to the effect above indicated. There will be no order as to costs.

Solicitors for appellants: *Blake & Redden.*

Solicitors for respondent: *Charles Russell & Co.*

Solicitors for Attorney-General for British Columbia, intervener: *Gard, Lyell, Betenson & Davidson.*

Solicitors for Canadian Manufacturers Association, interveners: *Lawrence Jones & Co.*

(1) Ante, p. 566. (2) Ante, p. 588.
(3) [1915] A. C. 330.

[PRIVY COUNCIL.]

S. M. K. R. MEYAPPA CHETTY . . . . . APPELLANT;

AND

S. N. SUPRAMANIAN CHETTY . . . . . RESPONDENT.

J. C.*
1916
March 2.

ON APPEAL FROM THE SUPREME COURT AT SINGAPORE.

Limitation—Executor—Accrual of Right to sue—Testator domiciled Abroad—Probate—"Capable of instituting suit"—Devolution of Interest—Substitution of Plaintiff—Straits Settlements Ordinance No. 6 of 1896, *ss.* 17, 22—*Straits Settlements Ordinance No.* 31 *of* 1907, *ss.* 133, 196.

Straits Settlements Ordinance No. 6 of 1896, which deals with the limitation of suits, provides as follows:—Sect. 17, sub-s. 1: "When a person who would, if he were living, have a right to institute a suit or make an application, dies before the right accrues, the period of limitation shall be computed from the time when there is a legal representative of the deceased capable of instituting or making such suit or application." Sect. 22: "When, after the institution of a suit, a new plaintiff or defendant is substituted or added, the suit shall as regards him be deemed to have been instituted when he was so made a party . . . . ":—

Held, (1.) that the executor of a will capable of probate in the Straits Settlements is a legal representative capable of instituting a suit, within the meaning of s. 17, sub-s. 1, from the date of the testator's death and not only from the date when he obtains probate: *quaere* as to an executor who renounces probate; (2.) that, according to the English practice (which is made applicable in the Straits Settlements in the absence of any other provision), the will of a testator domiciled in British India, or elsewhere outside the Straits Settlements, although not proved in the place of the testator's domicil, is capable of probate in the Straits Settlements if (*a*) it is valid according to the law of the testator's place of domicil, and (*b*) if there are assets of the testator in the Straits Settlements; (3.) that s. 22 contemplates cases in which a suit is defective by reason of the right persons not having been made parties, but not cases in which the suit was originally properly constituted but has become defective owing to a devolution of

---

* *Present:* Earl Loreburn, Lord Atkinson, Lord Parker of Waddington, and Lord Sumner.

J. C.
1916
MEYAPPA CHETTY v. SUPRAMANIAN CHETTY.

interest; in the latter circumstances a carrying-on order should be made under s. 169 of the Civil Procedure Ordinance No. 31 of 1907.

APPEAL from a judgment of the Supreme Court of the Straits Settlements (Settlement of Singapore), delivered June 26, 1914, reversing the judgment of the judge at the trial.

S. A. Supramanian Chetty, who was a native of and domiciled in British India, died on November 11, 1904, having by his will appointed as his executors S. R. M. Ramasamy Chetty (hereinafter called the executor) and another person who renounced probate at some date prior to August, 1907. For some years before his death the deceased had carried on a business at Singapore in partnership with the respondent. In December, 1904, the will was presented to the Court in British India for registration and probate. The respondent entered a caveat and contested its validity. After being set aside by the District Judge the will was affirmed by the High Court at Madras, probate being eventually granted to the executor in India on March 10, 1912.

Meanwhile, on March 10, 1910, the Supreme Court at Singapore granted to P. L. M. A. V. Meyappa Chetty, as representing the widow of the deceased, letters of administration pendente lite as to the assets within the jurisdiction of that Court. On October 23, 1911, he, as administrator pendente lite, commenced the present suit in the Supreme Court, claiming a declaration that the partnership in Singapore between the deceased and the respondent was dissolved by reason of the death of the deceased, and for the usual accounts and realization.

After the executor had obtained probate in India he appointed the appellant by power of attorney to obtain in the Straits Settlements a grant of letters of administration with the will annexed, and the grant was accordingly made. On April 11, 1913, it was ordered by consent that the name of P. L. M. A. V. Meyappa Chetty should be struck out as plaintiff in the suit and the name of the appellant substituted.

The respondent by his defence pleaded that the suit was barred by limitation, and the question of law so raised was subsequently argued upon an agreed statement of the facts.

The Straits Settlements Limitation Ordinance No. 6 of 1896, by s. 4 and Sched. II., art. 86, provides that the period of limitation in the case of a suit for an account and a share of the profits of a dissolved partnership shall be three years from the date of the dissolution. Sect. 17, sub-s. 1, and s. 22, which were also material, are set out in the head-note.

Sproule J. held that the suit was not barred. Upon appeal this decision was reversed by Bucknill, acting C.J., and Sercombe Smith J., Ebden J. dissenting.

1916. Jan. 20, 21, 23. *Holman Gregory, K.C.*, and *Jowitt*, for the appellant. Sect. 17, sub-s. 1, of the Limitation Ordinance applies to the present suit; it applies to all suits in which the right of action has not accrued to the deceased before his death. There was no personal representative capable of instituting the suit until March 10, 1910, when the original plaintiff was granted letters of administration pendente lite. The suit was commenced on October 23, 1911, and was therefore in time within Sched. II., art. 86. The title of an administrator and his right to sue date from the grant and not from the death of the deceased: Tristram and Coote, Probate Practice, 14th ed., p. 58. The testator being domiciled outside the Straits Settlements could not institute a suit there until he had obtained administration or probate within that jurisdiction: *Vanquelin* v. *Bouard* (1); Williams on Executors, 10th ed., p. 271. Under the Straits Settlements Civil Procedure Ordinance No. 31 of 1907, s. 840, the executor could have obtained administration but not probate in the Straits Settlements. It is true that under Ordinance No. 12 of 1909, s. 44, probate in the Straits Settlements could be obtained upon an authenticated copy of the will, but under that section probate could not have been obtained before 1910. The respondent was himself disputing the will, and the executor cannot be regarded as capable of instituting a suit against him until the will was admitted to probate in India. The appellant was not a new plaintiff within the meaning of s. 22. The order of April 11, 1913, though in form made under s. 133 of the Civil Procedure Ordinance, was in effect a carrying-on order under s. 169 of that Ordinance. The order effected no real change of parties, but was consequent

(1) (1863) 15 C. B. (N.S.) 341.

J. C. 1916 MEYAPPA CHETTY v. SUPRAMANIAN CHETTY.

upon a transmission of interest within the terms of the latter section.

Upjohn, K.C., and *Latter*, for the respondent. Even assuming that s. 17, sub-s. 1, applies to the present suit, time began to run from the death of the testator, or at any rate from the date when the second executor renounced probate; in either case the suit is barred. The language of the sub-section is that used in *Murray* v. *East India Co.* (1), and the intention was to enact the law as established by judicial decisions in England. According to those decisions an executor can institute a suit on behalf of the estate at any time after the death of the testator, probate being merely necessary as evidence of title at the trial: Comyn's Digest, "Administration" B. 9 and B. 10; *Thompson* v. *Reynolds* (2); *Knox* v. *Gye* (3); *Woolley* v. *Clark.* (4) If a sole executor renounces probate time does not run because the renunciation relates back; here the executor, having intermeddled, could not renounce. There is no difference in principle in the case of the executor of a testator with a foreign domicil. A will valid according to the law of the place of domicil of the deceased is capable of probate in the Straits Settlements if there are assets there: *In the Goods of Deshais* (5); *Whyte* v. *Rose.* (6) Probate in the Straits Settlements could have been obtained before the grant in India under s. 840 of the Procedure Ordinance, 1907, as amended by Ordinance No. 12 of 1909, s. 44. But, the will being capable of probate in the Straits Settlements, it is not material to the present question at what date probate could have been obtained. The decision in *Vanquelin* v. *Bouard* (7) and the passage in Williams on Executors relied on by the appellant refer only to the necessity of a grant of administration or probate being obtained in the jurisdiction before the suit comes to trial. But even if there was no representative capable of suing before the grant pendente lite the suit is still barred. The present appellant, who was substituted as plaintiff by the order of April 11, 1913, was a new plaintiff within the meaning of s. 22 of the Limitation Ordinance. The proviso to that section would be unnecessary if this was

(1) (1821) 5 B. & Ald. 204.
(2) (1827) 3 C. & P. 123.
(3) (1872) L. R. 5 H. L. 656.
(4) (1822) 5 B. & Ald. 744.
(5) (1865) 34 L. J. (P.) 58.
(6) (1842) 3 Q. B. 493, 507.
(7) 15 C. B. (N.S.) 341.

not so. The order was in fact made under s. 133 of the Procedure Ordinance.

Jowitt in reply. At the date when the suit was instituted the executor had done nothing in the Straits Settlements which amounted either to an acceptance or renunciation of probate. Intermeddling in the estate in India does not amount to intermeddling in the Straits Settlements : *Lowe* v. *Farlie* (1) ; *Logan* v. *Fairlie.* (2) The suit instituted by the administrator pendente lite was therefore not barred when it was commenced ; it cannot have become barred by subsequent acts of the executor who is not a party.

March 2. The judgment of their Lordships was delivered by

LORD PARKER OF WADDINGTON. The facts of this case are not in dispute. S. A. Supramanian Chetty, a native of and domiciled in British India (hereinafter referred to as " the testator "), carried on for some years prior to his death a money-lending business in Singapore in the Straits Settlements in co-partnership with the respondent. He died on November 11, 1904, having by his will appointed S. R. M. Ramasamy Chetty and another to be his executors. Caveats were entered against the proof of this will, and in August, 1907, S. R. M. Ramasamy Chetty (his co-executor having renounced probate) presented a petition in the Court of the District Judge of Madura, in the Madras Presidency, propounding the will in solemn form. Ultimately, after protracted litigation, the High Court of Judicature at Madras ordered the District Judge at Madura to grant probate of the will to S. R. M. Ramasamy Chetty, and such probate was on March 10, 1912, granted accordingly. An appeal from the order of the High Court of Judicature in Madras has recently been dismissed by His Majesty in Council.

Meanwhile, on March 7, 1910, letters of administration pendente lite to the estate of the testator, situate within the jurisdiction of the Supreme Court of the Straits Settlements, were granted by that Court to P. L. M. A. V. Meyappa Chetty, the attorney of the testator's widow, and on October 23, 1911, the administrator pendente lite instituted the present suit, asking for a declaration that the partner-

(1) (1817) 2 Madd. 101. (2) (1835) 1 My. & Cr. 59.

J. C. 1916

MEYAPPA CHETTY v. SUPRAMANIAN CHETTY.

ship existing between the testator and the defendant had been dissolved by the testator's death, and for the usual partnership accounts. The first question their Lordships have to decide is whether this suit was at the date of its institution barred by s. 4 of the Straits Settlements Ordinance No. 6 of 1896, being an Ordinance to amend the law relating to the limitation of suits.

Sect. 4 of this Ordinance provides that (subject to the provisions contained in ss. 5 to 25 thereof inclusive) every suit instituted after the period of limitation prescribed therefor by the Second Schedule thereto shall be dismissed, provided that limitation has been set up as a defence. The period prescribed by the Second Schedule in the case of a suit for an account and a share of the profits of a dissolved partnership is three years from the date of the dissolution. The date of dissolution was in the present case the testator's death ; and unless there is something to the contrary contained in ss. 5 to 25 of the Ordinance, it is not disputed that time had run prior to the institution of the present suit.

Reliance is, however, placed on s. 17, sub-s. 1, of the Ordinance, which provides that when a person who would, if he were living, have a right to institute a suit or make an application dies before the right accrues, the period of limitation shall be computed from the time when there is a legal personal representative of the deceased capable of instituting or making such suit or application. It is contended that there was no legal representative of the testator capable of instituting this suit until the appointment on March 7, 1910, of an administrator pendente lite, and that therefore the period of limitation must be computed from March 7, 1910.

Assuming, but without deciding, that this is to be deemed to be a suit which the testator would, if he were living, have a right to institute, their Lordships have come to the conclusion that this contention cannot be upheld. It is quite clear that an executor derives his title and authority from the will of his testator and not from any grant of probate. The personal property of the testator, including all rights of action, vests in him upon the testator's death, and the consequence is that he can institute an action in the character of executor before he proves the will. He cannot, it is true, obtain a decree before probate, but this is not because his title depends on probate, but because the production of probate is the only way in

which, by the rules of the Court, he is allowed to prove his title. An administrator, on the other hand, derives title solely under his grant, and cannot, therefore, institute an action as administrator before he gets his grant. The law on the point is well settled: see Comyn's Digest, "Administration," B. 9 and 10; *Thompson* v. *Reynolds* (1); *Woolley* v. *Clark*. (2)

It would seem, therefore, that an executor is not only the legal representative of his testator, but capable of instituting a suit within the meaning of s. 17, sub-s. 1, of the Ordinance in question. There is nothing in the Ordinance to confine "legal representative" to a person to whom the Court has actually made a grant. But, in their Lordships' opinion, the words "capable of instituting a suit" mean capable of instituting a suit in which a decree might be obtained. The will under which the executor claims must therefore be capable of probate; otherwise the action must fail. It has to be determined, therefore, whether the testator's will was in the present case capable of probate in the Straits Settlements. This question depends on the Civil Procedure Code, Ordinance No. 31 of 1907.

Sect. 3 of that Code provides that where no other provision is made by the Code or any law in force for the time being, the procedure and practice for the time being in force in the Supreme Court of Judicature in England shall, as near as may be, be followed and adopted. There is nothing in the Code or in any law in force in the Straits Settlements precluding the Supreme Court of the Straits Settlements from granting probate of the will of a person wherever domiciled. The English practice is therefore applicable. According to English practice, probate may be granted of the will of a person domiciled abroad upon proof that it is a valid will according to the law of the domicil, and that there are assets within the jurisdiction. It is not necessary that it should be first proved in the Courts of the domicil: see Jarman on Wills, 6th ed., vol. 1, p. 7, and *Robinson* v. *Palmer*. (3) It follows that the testator's will could have been proved in the Straits Settlements (1.) because it was valid according to the law of the testator's domicil, as shown by its admission to probate in the Court of the District Judge at Madura; and

(1) 3 C. & P. 123. (2) 5 B. & Ald. 744.
(3) [1901] 2 I. R. 489.

J. C. 1916

MEYAPPA CHETTY v. SUPRAMANIAN CHETTY

(2.) because there were assets of the testator locally situate in the Straits Settlements.

There was a good deal of discussion before their Lordships' Board as to what would have been the result had the English Statutes of Limitation been applicable. This discussion, though perhaps not strictly relevant, was useful as illustrating the principles which ought to guide the Court and throwing light on the meaning of the Ordinances of the Straits Settlements. For the purpose of the English Statutes of Limitation time runs from the accruer of the cause of action, but a cause of action does not accrue unless there be some one who can institute the action. In the case of a cause of action arising in favour of the estate of a deceased person at or after his death time will at once begin to run, if there be an executor, even though probate has not been obtained: *Knox* v. *Gye* (1); but if there be no executor, time will run only from the actual grant of letters of administration: *Murray* v. *East India Co.* (2) It is, in their Lordships' opinion, probable that s. 17, sub-s. 1, of the Ordinance in question was intended to apply this rule. A good deal was also said as to what would be the effect if the executor who might have instituted proceedings subsequently renounced probate. Their Lordships at first thought that this might be important for the purposes of the present case, because it is doubtful whether one of two joint executors can properly institute proceedings on behalf of their estate. On reference, however, to the record on the appeal from the order of the High Court of Judicature at Madras directing probate to be granted, it appears that S. R. M. Ramasamy Chetty's co-executor renounced probate at some time before August, 1907. Since August, 1907, S. R. M. Ramasamy Chetty was therefore sole executor and capable of instituting the action. The three years prescribed by the Ordinance must therefore in any case have elapsed before the suit was instituted.

The second question argued before their Lordships turns upon the effect of s. 22 of the Limitation Ordinance. That section provides that when after the institution of a suit a new plaintiff is substituted or added, the suit shall as regards him be deemed to have been instituted when he was so made a party; provided that when a plaintiff dies, and the suit is continued by his legal representative,

(1) L. R. 5 H. L. 656. (2) 5 B. & Ald. 204.

it shall as regards him be deemed to have been instituted when it was instituted by the deceased plaintiff. It appears that after the grant of probate by the Court of the District Judge at Madura the letters of administration pendente lite granted to the original plaintiff in this suit were cancelled, and in lieu thereof letters of administration with the will annexed were granted by the Supreme Court of the Straits Settlements to the appellant as attorney for the proving executor. Subsequently, on April 14, 1913, an order was made in the suit striking out the original plaintiff and substituting the appellant as plaintiff. It is contended that, as regards the appellant, the suit therefore must, under s. 22 of the Ordinance, be deemed to have been instituted on April 14, 1913, at which date the action was barred, even if it was not barred when the action was instituted by the original plaintiff. Having regard to their Lordships' decision on the first question, it is not, strictly speaking, necessary to decide this point. In view, however, of its importance in practice it may be desirable to deal with it.

Their Lordships are of opinion that s. 22 contemplates cases in which a suit is defective by reason of the person or one of the persons in whom the right of suit is vested not being before the Court. Sect. 133 of the Civil Procedure Code provides against the defeat of a suit on this ground and enables the proper party to be added or substituted. If A. is the right person to sue, it would be clearly wrong to allow him, for the sake of avoiding the Limitation Ordinance, to take advantage of a suit improperly instituted by B. Their Lordships do not think that s. 22 of the Ordinance has any application to cases in which the suit was originally properly constituted as to parties but has become defective because there has been a change or devolution of interest. Such cases do not fall within s. 133, but within s. 169, of the Civil Procedure Code, and the proper remedy is by way of an order to carry on proceedings, and not of an order adding or substituting parties. The proviso to s. 22 of the Ordinance may have been inserted per cautelam, and cannot be relied on as controlling the operative words. The difficulty really arises out of the form of the order of April 14, 1913. What was required was an order under s. 169 of the Code, and if the order was competent it was competent under this section only. Their Lordships do not think that the respondent could have taken advantage of the form

J. C. 1916 MEYAPPA CHETTY v. SUPRAMANIAN CHETTY.

of order to escape a liability to which he would have been subject if the order had been made in proper form.

Under the circumstances their Lordships will humbly advise His Majesty that the appeal should be dismissed with costs.

Solicitors for appellant: *Whites & Co.*

Solicitors for respondent: *Loughborough, Gedge, Nisbet & Drew.*

[HOUSE OF LORDS.]

H. L. (E.)* 1916 *Jan.* 28.

CHURM . . . . . Appellant;

AND

DALTON MAIN COLLIERIES, LIMITED . Respondents.

Mines—Minimum Wage — Contract of Service — Construction — "Employer"—Collier and Filler—Filler receiving Wages directly from Collier—Liability of Colliery Owners—Coal Mines (Minimum Wage) Act, 1912 (2 *Geo.* 5, *c.* 2), *s.* 1, *sub-s.* 1.

A colliery company usually assigned two workmen, a collier and a filler, to each underground working place or stall, but occasionally a double or treble set of men, composed of an equal number of colliers and fillers, worked together in one stall. The men were paid upon a tonnage rate in accordance with the coal gotten. A weekly pay-note was made out to the number of the stall and the money was paid to the collier, or, in the case of double or treble sets, to one of the colliers. The division of the pay between the collier and the filler was a matter of private bargain between them. On entering the service of the colliery company all the workmen, whether colliers or fillers, were bound to sign three documents, one of which contained the by-laws of the company. By by-law 2, "All persons employed . . . . shall receive wages and payment according to the current rate of wages for the time being at the colliery." By by-law 13, "All persons working under or for or paid by contractors or other persons shall be deemed to be the servants of the owners of the colliery to the extent only that they shall be bound to obey these by-laws and the other rules of the colliery, but the owners of the colliery shall not be bound to see to the payment of or be liable for the wages due to such persons after they have paid the contractor or other person for whom such persons work."

A filler worked with a collier in a stall under an arrangement

---

* *Present:* Lord Buckmaster L.C., Lord Atkinson, Lord Shaw of Dunfermline, Lord Parker of Waddington, and Lord Sumner.

whereby the collier first took for himself for each shift 1*s.*, and the balance was equally divided in accordance with the number of shifts worked by each of the two men. In a certain week the balance coming to the filler under this arrangement was less than the minimum wage to which he was entitled under the Coal Mines (Minimum Wage) Act, 1912. The filler claimed a minimum wage from the colliery company. The company, who for all purposes other than the payment of wages were the employers of the filler, pleaded that they were not his employers for the purposes of the Act :—

Held, assuming without deciding that the "contract of employment" mentioned in s. 1, sub-s. 1, of the Coal Mines (Minimum Wage) Act, 1912, meant a contract of employment at wages, that an obligation was imposed on the colliery company to pay wages to the filler by by-law 2 and was not taken away by by-law 13, and that the company were the employers of the filler within the meaning of the Act and were liable to pay him a minimum wage.

Per Lord Shaw of Dunfermline : For the purposes of s. 1, sub-s. 1, of the Coal Mines (Minimum Wage) Act, 1912, it is not necessary that the employer should be also the paymaster of the workman.

Richards v. *Wrexham and Acton Collieries* [1914] 2 K. B. 497 distinguished.

Decision of the Court of Appeal reversed.

APPEAL from an order of the Court of Appeal reversing a judgment of Bailhache J.

The respondents were the owners of the Silverwood Colliery, situate in the South Yorkshire coalfield. The appellant was employed as a filler at the colliery.

The action was brought by the appellant against the respondents for a declaration that he was entitled under the terms of his contract of employment with the respondents as filler to be paid wages at not less than the minimum rate provided by the Coal Mines (Minimum Wage) Act, 1912. The respondents by their defence denied that they were the employers of the appellant within the meaning of the Act.

On entering the respondents' employment on May 21, 1913, the appellant signed three documents, which were required to be signed by all persons employed in any capacity at the colliery, namely, the signing-on book, the contract signature book, and the contract of service. By the signing-on book the workman undertook to obey, fulfil, and agree to the rules and regulations of the colliery and the respondents undertook to fulfil and perform the same on

H. L. (E.) 1916 CHURM v. DALTON MAIN COLLIERIES, LIMITED.

their part; and the workman was also required to state whether he was competent to work alone. To this the appellant answered No. By the contract signature book the respondents were empowered to make advances and supply certain specified articles, e.g., coal and fuel, to any workman employed at the colliery and to make payments on his behalf to certain accident and other funds, and to deduct from his wages the amount of such advances and payments, and the value of the articles, together with the rent (if any) of any house occupied by him. The contract of service contained the by-laws to be observed at the colliery.

The by-laws provided as follows :—

"1. Every person employed in and about this colliery, previously to entering on service, shall sign the contract of service.

"2. All persons employed shall be entitled to and shall receive wages and payment according to the current rate of wages for the time being paid at the colliery.

"3. The owners of the colliery shall provide the persons employed with work while such persons are in their employment, unless prevented by the state of trade, want of railway waggons, accidents, repairs of mine or works, or other causes beyond their control.

"4. Every person employed (in the absence of agreement to the contrary) shall give or receive 14 days' notice in writing, before leaving or being discharged from work, unless he shall violate any of these bye-laws or any of the special or general rules, or any provision of the Mines Regulation Acts, 1887 to 1905, or shall disobey the order of any official of the mine ; in any of which cases he shall be liable to be fined or dismissed without notice. Delay in dismissal for the purpose of investigation and inquiry shall not affect the right to dismiss."

"13. All persons working under or for and paid by contractors or other persons shall be deemed to be the servants of the owners of the colliery to the extent only that they shall be bound to obey these bye-laws and the other rules of the colliery, but the owners of the colliery shall not be bound to see to the payment of or be liable for the wages due to such persons after they have paid the contractor or other person for whom such persons work."

The by-laws are stated in greater detail in the judgment of Lord Parker of Waddington.

The system of working the colliery was as follows: Usually two men, a collier and a man called indiscriminately a filler or trammer, were assigned to each underground working place or stall; the coal was hewn by the collier and was loaded and transported by the filler. Occasionally, however, a double or even a treble set of men, composed of an equal number of colliers and fillers, worked together in a stall. The method of payment was as follows: The men were paid upon a tonnage rate in accordance with the coal gotten. The tonnage rate, together with various supplementary rates for piece work and day work, was published in a price list agreed between the respondents and the workmen. At the end of each working week the respondents made out to the number of the stall a pay-note called a collier's pay-note, showing the amount and the details of the coal gotten, &c., and deductions made in respect of the working in the stall. The money was paid to the collier (or, in the case of double or treble sets, to one of the colliers), and the division of the pay between the colliers and the fillers was a matter of arrangement between them. Apart from the question of wages, the respondents were admittedly the employers of the fillers for all purposes. The respondents determined the stall and the work of the filler and they engaged and dismissed him, and if a collier was dissatisfied with the filler with whom he worked his only remedy was to apply to the respondents to remove him. The Silverwood Colliery was for the purposes of the Coal Mines (Minimum Wage) Act, 1912, subject to the rates and rules of the Joint District Board for the district of South Yorkshire. By such rates a filler at the respondents' colliery was entitled to a minimum daily wage of 5*s.* 9*d.* By rule 3 a workman who failed to work 80 per cent. of the possible number of shifts worked during the week forfeited his right to be paid at the minimum wage rate.

The appellant worked in stall No. 111 with a collier named Fuller. In the week ending July 23, 1913, Fuller worked four only out of a possible six shifts, which was less than the 80 per cent. required by the above-mentioned rule. In the same week the appellant worked five shifts, i.e., more than the requisite 80 per cent. On the day on which Fuller failed to work the appellant was set to work by the respondents and was paid for that day a wage of 4*s.* (plus

H. L. (E.) 1916

CHURM v. DALTON MAIN COLLIERIES, LIMITED.

the proper percentage) in accordance with the terms of the price list, and this sum was included in the pay-note.

The method of division as arranged between Fuller and the appellant of the moneys earned jointly between them and credited to the stall was as follows: For each shift that Fuller worked he first took for himself 1*s.*, and the balance remaining was then divided equally in accordance with the number of shifts worked by each of the two men. For the week ending July 23, 1913, the total amount earned by and credited to stall No. 111 was 2*l.* 4*s.* Of this sum Fuller first took 4*s.* for the four shifts he had worked, and the balance of 2*l.* was divided in the proportion of five to the appellant and four to Fuller in accordance with the number of shifts each had worked. On such calculation Fuller received 1*l.* 1*s.* 9*d.*, and the appellant 1*l.* 2*s.* 3*d.* The appellant was entitled, on the scale of the minimum wage for the district, to receive 1*l.* 12*s.* 11*d.* for the five shifts which he had worked, and he claimed the balance required to make up the minimum wage from the respondents. The respondents pleaded that for the purposes of s. 1, sub-s. 1, of the Coal Mines (Minimum Wage) Act, 1912, the appellant was employed not by them but by Fuller. Bailhache J. gave judgment for the appellant and made a declaration in his favour in the terms of the writ, but his judgment was reversed by the Court of Appeal (Buckley, Pickford, and Bankes L.JJ.) on the ground that the case was governed by *Richards* v. *Wrexham and Acton Collieries.* (1)

1915. Nov. 1, 2, 4, 5. *Gordon Hewart, K.C.*, and *H. T. Waddy*, for the appellant. Accepting the construction put by the Court of Appeal upon s. 1, sub-s. 1, of the Coal Mines (Minimum Wage) Act, 1912, that the employment must be an employment at wages, there is here an employment of the filler by the respondents at some wages (by-laws 1 and 2), and therefore the Act applies. It is not necessary that there should be an employment at a specific wage; it is enough that the wage should be apportioned between the collier and the filler as they may arrange. The pay-note is not made out to any particular man, but to the number of the stall, although in practice it is the collier who goes to the office and gets the money.

(1) [1914] 2 K. B. 497.

It is not true to say that the collier employs the filler. The filler having signed the contract of service, as did also the collier, he comes under the control of the respondents. It is the respondents who assign to him his place of work; grant him holidays; dismiss him; take proceedings against him for absence; pay him compensation under the Workmen's Compensation Act, which requires that the compensation shall be paid by the employer; pay the employer's share of the insurance money under the National Insurance Act. No doubt arrangements as to remuneration are made between the collier and the filler, but they are the common sharing arrangements of the district. By-law 13 is relied upon by the respondents, but colliers are not included in the term "contractors or other persons" in that rule so as to make them employers. So to include them would lead to grotesque results.

It is said that the workmen of an independent contractor sign the by-laws and that therefore no inference can be drawn from the fact that the filler signs, but the answer is that many of the by-laws which apply to the filler have no application to the workmen of the independent contractor: see particularly by-law 4, which requires a month's notice on either side for the termination of the engagement. The respondents are not merely the primary but the real employers of the appellant for all purposes, and as such are liable for his wages under by-law 2.

Richards v. *Wrexham and Acton Collieries* (1) has no bearing on this case, because there the terms and conditions of employment were substantially different. But, unless distinguishable, it was wrongly decided. [They also referred to *Higginson* v. *Blackwell Colliery Co.* (2) and *Hooley* v. *Butterley Co.* (3)]

Sir Robert Finlay, K.C., and *Leslie Scott, K.C.* (with them *T. E. Ellison*), for the respondents. The Coal Mines (Minimum Wage) Act, 1912, does not alter the relation of the parties and does not make any one an employer who was not an employer before; it merely puts upon the employer the obligation of paying the minimum wage. By-laws 2 and 13 must be read together. By-law 2 means that the respondents contract that the current rate of wages shall

(1) [1914] 2 K. B. 497.
(2) (1914) 84 L. J. (K.B.) 1189.
(3) (1915) 84 L. J. (K.B.) 1969,

where the defendant is not quite correctly named.

H. L. (E.) 1916 — CHURM v. DALTON MAIN COLLIERIES, LIMITED.

be the rate which every one employed at the colliery shall receive, but not that they shall pay the wages to every one so employed. By-law 13 deals with "contractors or other persons," which must include the collier if he makes a bargain with the filler. The by-law goes on to provide that such persons shall be subject to the by-laws, and that is necessary to secure the safety of the mine. The meaning of the by-law is that the respondents stipulate that they are not bound to make good the default of the collier, but are only bound to pay the collier the tonnage rate. The terms of remuneration are fixed between the collier and the filler. The filler works under and for the collier and looks to him for his wages, and the respondents have nothing to do with the filler's remuneration. There is a contract of employment of some kind between the respondents and every man employed in the colliery, but there is also a further contract between the collier and the filler in regard to their remuneration. There is no incongruity in there being concurrent contracts of employment: *Union Steamship Co.* v. *Claridge.* (1) Control and power of dismissal are no evidence of a promise to pay where the payment is consistently made by some one else. The only employer under the Coal Mines (Minimum Wage) Act, 1912, is the man who contracts to pay the wages. The effect of by-laws 2 and 13 taken together is that all persons employed at the colliery are to be paid the current rate of wages, subject to this qualification, that in the case of a filler working under a collier the respondents are under no liability to the filler after they have paid the collier the current rate. This case is governed by *Richards* v. *Wrexham and Acton Collieries* (2) and *Hooley* v. *Butterley Co.* (3)

H. T. Waddy replied.

The House took time for consideration.

1916. Jan. 28. LORD BUCKMASTER L.C. My Lords, the simple question in this case is whether the appellant, Isaac Churm, was, for the week ending July 23, 1913, in the employment of the respondents within the meaning of the Coal Mines (Minimum Wage) Act, 1912. It arises in this way: The appellant, who is what is known

(1) [1894] A. C. 185, 188. (2) [1914] 2 K. B. 497.
(3) 84 L. J. (K.B.) 1969.

as a " filler " in the Silverwood Colliery, received for his week's work, ending July 23, 1913, a sum of 1*l.* 2*s.* 3*d.*, while, according to the minimum wage rate for that mine at that time, he was entitled to receive 1*l.* 12*s.* 11*d.*, and he accordingly sued the respondents for the balance. The respondents deny their responsibility, but they admit—and, indeed, it would be difficult to avoid the admission—that the appellant is entitled to the minimum wage from some one; they say, however, that he must demand it from the collier with whom he worked. In other words, they contend that it is the collier by whom the appellant was employed within the meaning of the statute.

Now it appears that before any person enters to work in the respondents' mine he is required to sign three documents. One is called the " signing-on book," in which the name and occupation of the signatory is contained, together with a statement as to whether he is competent to work by himself under one of the general rules. The next is a document which entitles the colliery company to make deductions from wages due to any of the persons who sign the agreement in respect of rent and certain specified matters set out in a schedule. The third contains the by-laws of the respondent colliery and is headed " Contract."

Isaac Churm, the appellant, signed all these documents, described himself as a filler, and stated that he was not fit to work alone. At the time when the appellant signed these documents there was another man admittedly employed by the respondents in the mine within the meaning of the Minimum Wage Act. He was a collier and his name was John Fuller. He also had signed precisely the same documents as the appellant. In the mine it is the practice for the respondents to pay wages on the footing of so much per ton on the coal gotten and sent up the pit, and this sum is paid to the collier and by him divided between himself and the filler, according to various schemes and arrangements, which may vary between the different stalls.

In the present instance the collier first deducted 1*s.* a day for himself and then divided the balance equally, but there is no evidence that this was the result of any express agreement; it appears to have been a well-established method of division, and was in practice in Fuller's stall, to which the appellant was taken by the pony-

H. L. (E.) 1916 CHURM v. DALTON MAIN COLLIERIES, LIMITED. Lord Buckmaster L.C.

driver, under direction of the mine manager, after the signature of the documents, and introduced with these words, "There is a filler here for you."

At the end of each week the colliery company make out a pay-note in respect of the work done at a particular stall during the week. That note is headed "Collier's Pay-note," and is handed with the amount shown due to the collier. It is the practice which I have described and a certain clause in the contract containing the by-laws, to which I will more particularly refer, which, according to the respondents' contention, prevent them from being liable for the minimum wage. Before, however, considering the contract, it would be well to state what the respondents themselves say as to their relationship to a person employed on the terms of the appellant's service.

They admit that they, and they only, (1.) engage him; (2.) dismiss him; (3.) direct where he works, and move him from stall to stall; (4.) grant him holidays; (5.) pay the employer's contribution under the Insurance Act; (6.) are responsible under the Workmen's Compensation Act for any damage which he may suffer; and (7.) take proceedings against him under the Employers and Workmen Act, 1875.

It is difficult to think of a single one of the necessary elements for determining conditions of employment that is lacking in this category excepting the obligation which is in dispute, i.e., the obligation of paying wage. If it were established that that obligation were absent—and the burden of displacing the implied duty of payment arising from these circumstances would certainly be on the respondents—I should by no means be satisfied that the duty imposed by s. 1 of the Minimum Wage Act had been displaced, for that section runs in these terms: "It shall be an implied term of every contract for the employment of a workman underground in a coal mine that the employer shall pay to that workman wages at not less than the minimum rate settled under this Act."

Now, there *is* a perfectly clear contract in this case for the employment of the appellant to work underground in a coal mine, and it may well be argued that there ought to be ingrafted on to that contract the statutory obligation which the section imposes.

In this case, however, that question does not appear to me to arise, for the following reason.

Clause 2 of the contract between the parties expressly provides that all persons employed shall be entitled to and shall receive wages and payment according to the current rate of wages for the time being paid in the colliery; and it is that express obligation, apart from the implied obligation resulting from the performance of work under a contract of service, which binds the colliery company to provide payment for work done. There is nothing from beginning to end to distinguish the position of a collier and a filler in any of the written documents until the pay-sheet is reached, that is, until after the work is done, and the collier's right to wages arises from the same primary obligation as that of which the filler equally enjoys the benefit. In my opinion the true view of the matter is that the colliery company employed two men to work together to do a piece of work on terms that they (the colliery company) would provide the wage which the men would divide between themselves, and the fact that the money is actually handed to the collier and divided by him in accordance with practice does not prevent the filler from being entitled to wages from the company. This view would, I think, have been accepted by the Court of Appeal were it not for clause 13 of the same document, which is in these terms: "All persons working under or for and paid by contractors or other persons shall be deemed to be the servants of the owners of the colliery to the extent only that they shall be bound to obey these bye-laws and the other rules of the colliery, but the owners of the colliery shall not be bound to see to the payment of or be liable for the wages due to such persons after they have paid the contractor or other person for whom such persons work."

The construction of this clause is not easy, for it appears to be a combination of provisions relating to different classes of people. The first words, down to "other persons," cover, though they extend far beyond, the case of people who are in no true sense in the employment of the colliery company, but who have entered the mine for the purpose of performing work, as, for example, the installation of electric light, under contract with the colliery company. Such people would be bound to obey the by-laws that affect the conditions of working underground, and we were informed that they are

H. L. (E.) 1916

CHURM v. DALTON MAIN COLLIERIES, LIMITED.

Lord Buckmaster L.C.

consequently required to sign the contract in which the by-laws are contained. With regard to people of this class, that is, people who are not in fact servants of the colliery company, the clause goes on to provide, quite properly, that such signature shall not render them servants of the colliery company, except to the extent that they are bound to obey the by-laws. It is obvious that there are clauses in the contract which could not apply to such people. Clause 4, which provides for notice before leaving work; clause 5, which requires attendance on each day that the pit is open; clause 6, which requires permission from the proper official for absence from work at the time for commencement; and many other clauses of the same character, can clearly have no application to persons who are brought into the mine to perform work other than mining work, as part of the staff of an independent contractor.

But it is quite possible that a collier may be included in the somewhat generous ambit of the phrase "or other persons," though it appears to me difficult to make that meaning agree with the subsequent words; but even on this assumption the latter part of the clause merely negatives the obligation of the owners to be liable for the payment of wages after they have been paid. In other words, it recognizes the obligation up to the time when such payment is made, and if that be so the conditions of the section would be satisfied. Even if the employment referred to must be interpreted as being an employment at wages, the subsequent provision that after payment the company would not be liable would, if it interfered with the operation of the statute, become void. If there be no primary obligation on the part of the colliery company to pay the filler wages, I cannot see where their obligation to pay the collier arises, for there is no distinction between the two classes of people in the written documents; and again, if no wages were ever due from the colliery company to the filler, the second contract, which provides for deductions, would in the ordinary course of working appear to be meaningless.

In my opinion the obligation to pay wages is not merely implied, it is expressly imposed by clause 2 of the contract, to which I have referred, and is not negatived by any subsequent provision.

Several cases were quoted by the respondents as authority for their view, the two most important being the case of *Richards*

v. *Wrexham and Acton Collieries* (1) and *Hooley* v. *Butterley Co.* (2) The former of these two cases is the nearest, but upon examination it will be found to afford little assistance. The question for decision there was the liability for payment of a wage that was the excess between the minimum wage and the wage that had in fact been earned. The filler was paid through the collier a daily wage, and the learned county court judge before whom the case was heard in the first instance found as a fact that the contract for this payment existed between the filler and the collier. No such fact, and no corresponding fact, has been found by the learned judge in this case, nor, indeed, is there any evidence which could support such a finding.

Further, the clauses in the governing contracts were different from those in the present instance, and in certain places referred to a miner engaging a filler and to a filler "employed by" a miner. No such words and no similar provisions are to be found in the present case. I do not think that the Court of Appeal need have considered themselves bound by the decision, nor is it necessary to consider the soundness of the authority for the present purpose. The latter case is, I believe, the subject of an appeal to this House, and, on its hearing, the details of the contract and the conditions of service will be the subject of full investigation and argument; it is therefore not desirable to say any more about it at present except that the facts and documents are clearly not identical with those in the present case and can give no guidance in arriving at a conclusion on this appeal.

For the reasons I have given, I think this appeal should be allowed, the judgment of the Court of Appeal should be reversed, the judgment of Bailhache J. should be restored, and the respondents should pay the costs here and below.

LORD ATKINSON. My Lords, in this case two questions emerge for the consideration of the House; first, whether the construction of the first section of the Coal Mines (Minimum Wage) Act, 1912, adopted by the Court of Appeal is its true construction; and, second, whether, even if it be so, the appellant, having regard to the established facts in this case, is entitled to the declaration he

(1) [1914] 2 K. B. 497. (2) 84 L. J. (K.B.) 1969.

H. L. (E.) 1916 CHURM v. DALTON MAIN COLLIERIES, LIMITED. Lord Atkinson.

claims, namely, that he, under his contract of employment with the respondents, made on or about May 21, 1913, is entitled to be paid by them wages at not less than the minimum rate. The Court of Appeal, following their decision in the case of *Richards* v. *Wrexham and Acton Collieries* (1), held that the contract of an employer with a workman underground in a coal mine in which it is to be an implied term that the employer shall pay to that workman wages at not less than the minimum rate settled by the Act must be a contract to pay wages, so that, however completely the contract may establish the relation of master and servant, or employer and employee, between the owner of a colliery and his workman underground, the latter is, as against the colliery owner, excluded from the benefit of the Act unless the obligation to pay the workman wages is imposed by this contract upon the colliery owner, or, in effect, that all the statute does is to fix a minimum for the wages contracted by an employer to be paid to his workman. It is not disputed that the statute does not say so expressly. The section has already been read.

By s. 5 a workman is, with certain exceptions immaterial in this case, defined to be any person employed in a coal mine below ground, and it was not disputed that the plaintiff was a workman within the meaning of that definition. In the *Wrexham Case* (1), as it has been styled for the sake of brevity, Vaughan Williams L.J. dissented from the decision of his colleagues, Buckley L.J. and Kennedy L.J.

I confess I see great difficulty in accepting the construction of the section adopted by the Court of Appeal in the *Wrexham Case*. (1) At the time that statute was passed the Workmen's Compensation Act of 1906 was in full force and effect. Its first section provides that " if in any employment personal injury by accident arising out of and in the course of the employment is caused to a workman, his employer shall, subject as hereinafter mentioned, be liable to pay compensation in accordance with the First Schedule to this Act." That is the dominating provision, giving a right to compensation, the schedule only providing the mode in which the amount of that compensation is to be ascertained : *Lysons* v. *Andrew Knowles & Sons*. (2) When one turns to the schedule one finds that in

(1) [1914] 2 K. B. 497. (2) [1901] A. C. 79.

case of the death of a workman whose dependants are wholly dependent upon his earnings, the amount of the compensation is to be a sum equal to his earnings in the employment of the same employer during the three years preceding the injury, or the sum of 150*l.*, whichever be the larger.

If total or partial incapacity results from the injury, the compensation is a weekly sum during incapacity not exceeding his average weekly earnings during the preceding twelve months, if he has been so long employed, but if not, then for any less period during which he shall have been in the employment of the same employer. Par. 2, sub-head (*b*), of the schedule provides for the case of a workman entering into concurrent contracts of service for two or more employers, and provides that his average weekly earnings are to be computed as if his earnings under all such employments were earnings in the employment of the employer for whom he was working at the time of the accident. Sub-head (*c*) of the same paragraph provides that "employment by the same employer" shall be taken to mean "employment by the same employer in the grade in which the workman was employed at the time of the accident, uninterrupted by absence from work due to illness or other unavoidable cause." It has been many times laid down in this House that what the workman is, under this statute, to be compensated for is not the pain and suffering inflicted upon him by the accident, but the loss of his capacity to earn remuneration for his labour. From the above-mentioned provisions of the schedule, as well as from many others, it is, I think, clear that the amount of the compensation is to be measured by the workman's earnings, and that those earnings are, where not otherwise expressly provided, the earnings he obtains from the particular employer upon whom the burden of compensating him is, by the first section of the statute, thrown. I find no provision in the schedule contemplating the case of an employer who has a workman in his employment to whom he pays nothing.

It is, I think, almost impossible to suppose that the Legislature could ever have intended, in the case of two workmen such as a collier and a filler, engaged by piece work on the joint enterprise of excavating coals in a designated stall in a coal mine, and transporting that coal to a place from whence it can be lifted to the surface

H. L. (E.) 1916 CHURM v. DALTON MAIN COLLIERIES, LIMITED. Lord Atkinson.

and weighed, that one of them should be liable to compensate the other for injuries sustained by accident in their joint work; and if not, how is the Act to be applied to the case of that one of the two to whom the coalowner has neither paid nor contracted to pay anything in the nature of wages? If the burden of compensating a workman be not thus thrown on his fellow-workman, it is difficult to see how the amount of the compensation, even if the colliery owner be liable, can be measured. This is not the only difficulty which occurs to me, but I need not pursue the subject further, since in my view the facts of the present case are so radically different from those of the *Wrexham Case* (1) in all material respects, that the former can well be disposed of without pronouncing a definite opinion as to whether the construction of the first section of the statute of 1912 adopted by the Court of Appeal be its true construction or the contrary.

During the argument of the case before this House, I put to Sir Robert Finlay, who appeared for the respondents, this question: If A. should employ two workmen, B. and C., to do jointly certain work by the piece, at a certain rate per a certain measure, the remuneration to be paid weekly and be divided between them in such shares as X. should appoint, would the contract between A. and each of these workmen not be a contract to pay wages within the meaning of the Minimum Wage Act? He, as I understood him, answered in the affirmative. I then asked him, would it, in such a case, make any difference if the weekly sums received should be divided between them as they themselves should arrange? I understood him to reply in the negative. I may have misunderstood him; if so, I apologize; but however that may be, I am myself confidently of opinion that, in the absence of all special provision as to the relation between the two workmen so employed, it would make no difference whatever.

In my view the present case is precisely a case of the latter description. The collier and the filler stand to each other as two fellow-labourers, joint adventurers in one enterprise, that of hewing coals in a certain stall in the respondents' mine and transporting them to the particular place from which they are to be lifted to the surface and weighed. The remuneration stated in the price list, 13*s.* 4*d.*

(1) [1914] 2 K. B. 497.

per ten tons, covers all these operations, and in performing them each workman worked *with* the other—not *for* the other, but for the benefit of himself and the other. Neither do I think the filler worked under the collier, since neither in the written documents nor in the parol evidence do I find any sufficient proof that there was any subordination of the one to the other, or anything to show that the collier was put in a position of authority over the filler, or to indicate that he stood to the filler in the relation of master to servant or employer to employed. It is quite true that the collier received from the respondents the weekly remuneration due for the work done in the stall, and that the workmen divided that sum between them in certain shares.

The collier was not, as in the *Wrexham Case* (1), bound to pay, and did not, in fact, pay, to the filler a fixed wage out of the sum he himself received, irrespective of its amount, thus taking upon himself all the risk. The receipt of the gross remuneration loses all its significance when it is remembered that where two colliers and two fillers work in one and the same stall, one collier receives the entire remuneration due for the joint work done and divides it amongst the four. And yet it is not suggested that the collier who receives the gross sum is the master or employer of the other collier, who does not. He was, it was contended, the mere agent, not the master of the latter. It may well be that the work of the hewer of coals is a higher class of labour than that of the filler, but I altogether fail to see how the mere receipt of the money earned by the joint labour of them all in such a case, followed by the division of it among them, is per se any proof of the existence of the relation of employer and employed in the one case more than in the other.

It is not disputed in this case that in this colliery the respondents hired the filler, and that they, and only they, had the power to dismiss him; that they selected the stall in which he was to work, could put him to work there, transfer him from thence to another stall, or to other work, for a time long or short, and again restore him to his original place of labour, and that while he was absent from the stall originally selected the respondents paid the filler a fixed daily wage. If he was absent for a week they paid the wage directly to him, but if he was absent for a shorter period his right to this

(1) [1914] 2 K. B. 497.

H. L. (E.)
1916
CHURM
v.
DALTON MAIN COLLIERIES, LIMITED.
Lord Atkinson.

daily wage was, as it were, carried to the credit of his original stall and entered in the weekly pay-note made out in the number of the stall, not in the name of any workman or workmen, as part of the joint earnings. If the collier was dissatisfied with his filler, his only resource was to complain of him to one of the officials of the mine, who removed him or not as he, the official, deemed prudent. This point is so important that one may be excused for quoting some extracts from the evidence of Fuller, the collier. He was asked, If he shared his wages with the appellant in the way that the total amount of the pay-note was made out to the number of the stall, and that he (the witness) took a shilling per day out of that total for every day he had worked, and then he and the appellant divided the balance equally in accordance with the number of shifts each had worked ? And he answered Yes. He was then asked, How did he first get Churm as a filler, whether he selected him, or the colliery sent him to him ? And he replied, " I did not know he was coming to work with me until after I got to work in the place. The pony-driver brought him in and said, ' There is a filler here for you.' "

He further said that the filler pays his own contribution under the Insurance Act ; that the colliery, and not he himself, made the proper deductions for any fines to which the appellant was liable ; that he had no power to dismiss the appellant ; that he could not himself send the filler to any working place other than his own ; that all the money due is paid to the collier on one pay-ticket ; that sometimes both he and the filler fill the coals. Then he was asked, supposing that another prop was wanted for the roof to make it safe, and he told the filler to put the prop there, he would have to do it, would he not ? And he answered, " No, I'd have to do it myself." Frederick Hall, one of appellant's witnesses, proved that at this colliery, out of every 9*s.* earned, the collier, by mutual arrangement, takes 5*s.* and the filler 4*s.* ; and that where the filler has a house to live in belonging to the colliery, the rent is deducted from the total wages. He was then asked to describe the butty system, and said it was a system where one man takes a contract to work a stall, and employs the men under him. That evidence is practically uncontradicted. Indeed, Mr. Blenkinsop, the manager of this colliery, examined for the respondents, stated that he did not know of a fixed daily wage being paid in any particular case in this

pit. Such is the practice of the colliery. As far as this evidence goes, it, in my opinion, negatives the suggestion that the filler is in any sense the employee of the collier, or that he is paid any wages at the cost of the collier; or in that sense, paid them by the collier. The fair conclusion, I think, is that the remuneration for the work done is paid by the respondents, through the agency of the collier, to all the employees working in each particular stall.

Now I turn to the written documents. Both collier and filler in this case have signed the same books. Both agreed to be bound by the several statutes mentioned in the first book, and by the general and special rules, regulations, and by-laws established in the colliery. The first of these rules provides that every person employed in or about the colliery previously to entering shall sign the contract of service. It is contended, rightly I think, that it is absolutely necessary for the protection of life and property, and the maintenance of discipline in a colliery, that every one working in a mine, whether an employee of the colliery owners or not, should be bound to observe these rules and regulations. That may well be. The second rule is to the effect that all persons employed shall be entitled to and shall receive wages and payment according to the current rate of wages for the time being paid in the colliery. As regards piece work, that can scarcely mean more, I think, than this, that payment for piece work shall be at the current rate for such piece work in the colliery. If the collier be the person directly liable to the filler for his wages, this rule must mean either that the collier must always pay to the filler joined with him in piece work a fixed wage equal to current rate, which is entirely inconsistent with piece work, done at the risk of both collier and filler, or that the colliery owner guarantees that the share received both by the collier and filler shall be equal to that rate. Whatever be its precise meaning, however, neither it nor the signed books suggest in any way that the filler is the servant of, or is subordinate to, or is employed or paid by the collier. They are quite as consistent with the respective positions of the workmen being reversed.

There remains rule 13, upon which much reliance has been placed. The difficulty in construing it arises from the fact that the respondents have endeavoured to deal in the same rule with two entirely

H. L. (E.) 1916 CHURM v. DALTON MAIN COLLIERIES, LIMITED. Lord Atkinson.

different classes of persons, namely, the servants of independent contractors, over whom it is necessary, for the maintenance of discipline in the mine, that the respondents should have power and authority to enforce obedience to the rules and regulations, and workmen working under the control of other workmen who have been in the habit of receiving from the colliery owners the wages of these latter and paying those wages over to them. And the protection the rule was meant to afford to the colliery owners was this, that having paid the wages once, they would be discharged from all liability, and could not be bound to see to the application of the sum paid. That was a quite intelligible and prudent object; but it is, in my view, clear that this rule operates upon relations theretofore existing, and does not create new relations.

It does not convert into a contractor one who was not theretofore a contractor. Nor does it put a workman in the position of one working under or for another workman, or being paid by another workman, who was not already in that position. As, in my view, the appellant was not a person working under or for or paid by the collier Fuller, rule 13 has not, I think, any application to this case. I think the appellant was, on the contrary, the servant of the colliery owners, receiving as wages from them such share of the gross remuneration for their joint labour as Fuller and he should arrange. Since that fell short of the minimum wage, I think the appellant is entitled to the declaration he claims. If the gross sum were sufficient, if equally divided, to pay the minimum wage to each of the workmen, then it no doubt would be hard upon the colliery owners that they should, by reason of the fact that one of their workmen absorbed the lion's share, be liable to pay the deficit to the other; but if the gross sum is insufficient, if equally divided, to pay the minimum wage to each workman, then it makes little difference whether the owners have to pay the small deficit to each, or, on an unequal division, a sum equal to both small deficits to one. In my opinion the decision appealed from was erroneous and should be reversed, and the appeal allowed, with costs here and below.

LORD SHAW OF DUNFERMLINE. My Lords, I concur.

The importance of the question is acknowledged. In the working of a mine there are many obstacles to be encountered, and many

dangers to be avoided, if mineral is to be got and life and limb are to be safe. By reason of these obstacles, or for the avoidance of these dangers, the work may be inevitably retarded and the output reduced. Men duly in attendance at the beginning of their shift may have to wait for hours ere they are allowed to begin work, the oversman or fireman having, in compliance with the law, withdrawn them from the faces where gas has been emitted, and having kept them off duty until the risk of asphyxiation or explosion is at an end. Similarly in the case of falls from the roof or the need of extra propping. As hour after hour slips by, the workman, who is paid by piece work, sees the chance of remuneration lessen or disappear. There may be obstacles to the getting of coal, or much trouble in the texture of the seam. The man may labour severely for the removal of these, but the output of coal be small, and all ordinary measure of wages to labour be lost. All this may occur without fault on either side, and it may yet be highly expedient to maintain the system of payment by piece work.

How to avoid the resultant insecurity, a risk which imperils subsistence to the workmen employed underground? There can, in my mind, be no doubt that this was the problem to which the Minimum Wage Act was addressed. If the judgment of Bailhache J. be right, the Act has solved it in a certain way prescribed; if the judgment of the Court of Appeal be right, the settlement attempted is rendered nugatory or partial or fails. This in no way, however, concludes the matter; nor can a consideration of the object of the Act be held to warrant a construction of its provisions in violation of the terms employed.

Sect. 1 of the statute prescribes: "It shall be an implied term of every contract for the employment of a workman underground in a coal mine that the employer shall pay to that workman wages at not less than the minimum rate settled under this Act . . . . and any agreement for the payment of wages in so far as it is in contravention of this provision shall be void."

My Lords, my respect for the learned judges of the Court of Appeal has led me to seek with especial care for the foundation of their construction of this statute. That foundation is, I think, discovered in the question put by Buckley L.J.: "Whether the plaintiff in this action was employed by the defendant colliery company at

H. L. (E.) 1916

CHURM v. DALTON MAIN COLLIERIES, LIMITED.

Lord Shaw of Dunfermline.

wages? It is not disputed that . . . . certain contractual relations subsisted between the plaintiff and the defendants. But what is to be searched for is this: Did these terms include an obligation as between the defendants and the plaintiff that the defendants would pay the plaintiff wages?"

The same language is held by Swinfen Eady L.J. in the subsequent case of *Hooley* v. *Butterley Co.* (1): "The first question is whether there was any evidence before the county court judge, upon which he could find that the defendants had agreed to pay the plaintiff for his services."

This, then, is the proposition: unless the mine owner, who has certain "contractual relations" with a workman, be also his—that individual workman's—paymaster, to that person as employer the Act cannot apply. This is the major premiss: if it be correct, and broad enough, all the rest of these judgments is perfectly logical; the superstructure stands. I am humbly of opinion that the proposition is incorrect, and much too narrow.

I find no warrant in the statute for construing its language—its use of the word "employer"—in any artificial or narrow or particular sense. The word, on the contrary, should be construed in its natural, its broad, and its general sense. There may be many modes of management, arrangements for remuneration, schemes of control, of men working in and about a mine. These men may fall into many classes; and the relations of each of the men so employed may be that of servant to the mine owner as employer.

The case of a piece-work contract is a good instance. It is carried out by one, two, or three colliers, co-operating with whom are one, two, or three trammers or fillers. The scheme of remuneration of these men, working as one team, may be a slump remuneration to the team, leaving the distribution of this to the men themselves, subject to regulations framed under the Act. Why should this rule out the mine owner from being the employer of any of the team but one? For every other purpose than the particular method in which remuneration reaches him, each man is and acts as a servant to the one employer, the mine owner, who alone engages him, alone dismisses him, and alone controls, stops, or transfers his work, and alone directs its nature and its place. I am of opinion that

(1) 84 L. J. (K.B.) 1969, 1974.

the language used in the statute has done nothing thus to narrow or to sterilize the protection and the benefit it purported to confer.

And with regard to the one member of the team through whose hands the payment made is distributed to the other members, that member does not, and dare not, presume to do or to order any one of those things just enumerated, which are each and all typical master acts and orders; and in my opinion it would be flying in the face of facts to treat him as the employer of the other members of the team. He is not their master: he is their fellow-workman. I do not think that this Act of Parliament is inconsistent with this either in its letter or its spirit.

My Lords, it needs no explanation from this House, that such a construction as that reached by the Court of Appeal, which for the purposes of the Minimum Wage Act holds that the relation of employer and servant does not exist between the mine owner and the filler, is the negation of what is recognized in the business and organization both of labour and of capital. Under this statute rules are made binding the mine owner on the one hand and those employed in and about the mine on the other, and representatives are appointed to voice the feeling and adjust the relations of both. Colliers and fillers for all such purposes are all alike servants working underground, and all under one and the same employer. And so rules are framed, by a general consent, based on a broad and practical recognition of facts as they are. Under other statutes all the men and all alike are insured, all the men and all alike have rights to compensation by the colliery owner, and it is admitted that to apply these statutes to the appellant—a filler—is a correct procedure. Why, then, if the respondents are employers, and the appellant an employee, for all these purposes, should the relation be ruled out for the purposes of s. 1 of the Minimum Wage Act? There is no prescription which enjoins this: there is no definition which limits "employer" in this sense. I think that the abandonment of the broad and general and ordinary sense of the term is in such circumstances not warranted by law.

But I desire to examine the proposition of the Court of Appeal in another sense. I think, as I have said, that it is too narrow. But I am also respectfully of opinion that it is in itself indefensible as a representation of the actual enactment.

H. L. (E.) 1916 CHURM v. DALTON MAIN COLLIERIES, LIMITED. Lord Shaw of Dunfermline.

There is no challenge of the main facts of the case, and there is no denial in the judgments of the Courts below that, in the language of Buckley L.J., "certain contractual relations existed between the plaintiff and the defendants." What were those contractual relations, except those of master and servant, employer and workman? I do not need, and I should not presume, to add to the terse and compendious statement of the facts contained in that passage of the judgment of Bailhache J. which reads thus: "If this were not a colliery case, all the usual tests for ascertaining in whose employment a particular workman is would lead one to one result, and one result only; namely, that the filler in this case is in the employ of the colliery company. It is the colliery company who engage him; it is the colliery company with whom he makes a contract, which is in writing; it is the colliery company who can take him from one piece of work and put him to another; they exercise full control over him; and it is the colliery company who dismiss him. All those tests are tests which are applied in other cases, and when they are all answered in one way they lead to the conclusion, and the only conclusion that one would otherwise come to, that the colliery company are the employers of the fillers in this case."

This being the state of the facts, what says the statute? My Lords, it adds another term to this contract: "It shall be an implied term of every contract for the employment of a workman underground in a coal mine that the employer shall pay to that workman wages at not less than the minimum." In my opinion, this gives to the workman an absolute right and imposes upon the employer an absolute obligation. The statute does not say that the implied term is only to enter a contract if the employer has already under it become bound to pay some wages, or to pay individual wages, to each individual workman. It would be a strange answer to this absolute obligation to pay a minimum wage to his servant that the employer should say "This statute cannot apply to me because I have done better than give him less than the minimum wage: I have bargained to give him no wages at all." One man, it may be not a few men, might be wishful of gaining practical experience of working underground in a coal mine, and very willing to sign on and bind themselves under the ordinary contracts and rules, taking

for a time their learning as their pay. This practice would introduce confusion and class trouble, and might be a source of danger; and the law does not allow it. Upon every one who assumes the position of employer the implied term of contract to give a minimum wage is imposed, and it is no answer to the law to say "I get my labour free."

Nor is it any answer to say "I shall pay the gaffer or head of a piece-work team a slump or overhead rate; to the one alone who receives the slump earnings do I stand employer under this Act; to the others working in the mine, bound by the colliery rules, signed on, and in every respect subject to colliery discipline and orders—to these others I owe no duty under the Act: for its purposes they are not my servants and I am not their employer."

Such a construction appears to me, my Lords, to be a defeat, and to sanction a defiance, of this Act of Parliament. It is a refreshment to observe that in the working of the colliery nothing so impracticable ever seems to have been contemplated. On the contrary, all the arrangements were made on the footing that the filler had the status of a servant of the owner as employer.

The contract signed by the appellant, the filler, and by the respondents, the colliery owners, humbly appears to me final on this topic. Rule 2 provides as follows: "All persons employed shall be entitled to and shall receive wages and payment according to the current rate of wages for the time being paid at the colliery." (1.) "All persons employed" is not restricted to all persons employed who are direct and individual recipients of wages from the owners. (2.) The language is general that all persons so employed "shall be entitled to and receive wages and payment." (3.) As in the case of the Minimum Wage Act itself, it starts with the fact of employment apart from wages, and then gives the right to wages and payment on the basis of that fact. (4.) By whom are the wages and payment to be disbursed? The answer is plain, from the terms of the contract under which "the owners of the said colliery hereby undertake to fulfil and perform the same." (5.) Finally, what do the concluding words mean: "according to the current rate of wages for the time being paid at the colliery"? Did that current rate apply to fillers as well as to colliers? It did. It is admitted that his minimum wage was fixed in accordance with statute by

H. L. (E.)
1916
CHURM
v.
DALTON MAIN COLLIERIES, LIMITED.
Lord Shaw of Dunfermline.

Sir Edward Clarke at 5*s.* 9*d.* per day. Taking the rule as a whole, or as analytically as may be, it does not appear to me to give any countenance to the proposition that the filler does not stand to the owner in relation of employed to employer. And from the other provisions of the rules and the contract and the very items of the pay-sheet, especially those as to deductions, it appears to me clearly that he was not only employed, but employed for wages. Then—to these circumstances—comes the Act of Parliament; and into his contract with the employer must be read the implied term of a minimum wage, unless the statute is to be disobeyed.

But much reliance is placed upon rule 13, as to "contractors and other persons." My Lords, it is an elementary principle of interpretation applicable to statutes, to contracts, or to rules or schedules, that if possible all sections should be taken together and should stand together; and it is the dernier ressort of construction that one section should be held destructive of the other. Repugnancy is never presumed, the presumption is all the other way.

In the present case no real difficulty of the kind arises. I myself might have some doubt as to whether "contractors or other persons" applies to classes of workmen like colliers and fillers working in and paid as a team or party. Contractors—whom one would denominate outside contractors—are well enough known. They may drive fresh shafts, they may fit up electric lighting apparatus, they may do many things, bringing and paying their own workmen. Some day, no doubt, there may be difficulty in bringing such workmen within the compass of rules, many of which are manifestly made—as to time, attendance, &c.—for men within the sphere of the mine as a coal producer. But the appellant was not employed, in my view, by a person of that class.

It is said that a collier, not employing or even fetching a filler, but working alongside of him, and distributing the slump earnings, is within the class of contractor aimed at. To test the argument let this be granted. The immediate consequence is to bring the filler within a clause that "he shall be deemed to be" a servant of the owner to the extent only that he would be bound to obey the by-laws and rules. The filler was actually and already a servant under the whole category of tests stated by Bailhache J., and, as pointed out, a servant under a contract which bound the owner to pay wages.

My Lords, the object of rule 13 is to my mind entirely plain from its concluding words: "but the owners of the colliery shall not be bound to see to the payment of or be liable for the wages due to such persons after they have paid the contractor or other person for whom such persons work." Its true object was, while conserving so far as might be the discipline of the Act, to relieve the employer from any obligation of double payment of wages. Slump payment, payment for a job as such, or to a team as such, is recognized; and the sensible provision is made that the separate wages cannot be recovered if the slump has been paid. The men are entirely protected; rules for distribution, carefully elaborated after arbitration, are adopted. And this is equally so, whether the collier, the actual and direct payee, be treated as an outside contractor or not.

The only question that remains to ask is, Was this filler paid his minimum wage? It is admitted that he was not. It is further admitted that the actual earnings were distributed according to the rules, and that there was not enough money, so to speak, to go round. The appellant was only paid 1*l.* 2*s.* 3*d.* instead of his minimum wage of 1*l.* 12*s.* 11*d.* In terms of the Act, the respondents must pay that balance.

It follows from this judgment that the reasoning upon *Hooley's Case* (1), already referred to, cannot be upheld. With regard to the *Wrexham Case* (2), I would point out that the terms of employment were there different from the present, and especially also that the action proceeded upon the footing that the minimum wage had in fact been paid. But the observations of the majority of the Court of Appeal in that case will necessarily be deprived of binding authority by the judgment now pronounced in this House.

LORD PARKER OF WADDINGTON. (3) My Lords, I agree.

The first section of the Coal Mines (Minimum Wage) Act, 1912, provides that "it shall be an implied term of every contract for the employment of a workman underground in a coal mine that the employer shall pay to that workman wages at not less than the minimum rate settled under this Act and applicable to that workman,"

(1) 84 L. J. (K.B.) 1969. (2) [1914] 2 K. B. 497.
(3) Read by Lord Sumner.

H. L. (E.) 1916

CHURM v. DALTON MAIN COLLIERIES, LIMITED.

Lord Parker of Waddington.

and any agreement for the payment of wages, in so far as it is in contravention of this provision, is to be void. It was held in the *Wrexham Case* (1) that this section did not apply unless the contract for employment underground were a contract for employment at a wage payable by the employer. I have some doubt whether this decision is correct. It if be correct, the section would not apply in the perfectly possible case of a person employed by A. at a wage which, under arrangements between A. and B., was payable by B. I do not, however, think that your Lordships need consider this point on the present occasion.

My Lords, no one in the present case disputes that the appellant was employed underground in the Silverwood Colliery. He is a filler working underground in loading up coal got by the collier employed in that particular stall to which he was assigned. Again, it is not disputed that he was employed at a wage. The only questions are by whom he was so employed and who was responsible for the payment of his wages. In considering these questions, I invite your Lordships' attention in the first place to the documentary evidence.

My Lords, on May 21, 1913, the appellant signed his name in the signing-on book of the respondent company, the owners of the colliery. Each person who signs this book expressly admits that he has received (inter alia) a copy of the general and special rules, regulations, and by-laws in force at the colliery, and undertakes to obey, fulfil, and agree to them, and the respondent company, by its manager, undertakes to fulfil and perform the same on its part. The appellant on the same day signed another book kept by the respondent company called the contract signature book. This book contains an agreement between the respondent company and the persons signing it to the effect that the company is empowered but not bound to make advances, or supply to such person any of the articles, matters, and things, or to perform any work, or make any payment specified or set out opposite the name of such person thereunder written, and to deduct from any wages from time to time due to such person the amount of such advances, and the value of any such articles, matters, and things, or work, or the amount of such payments, together with the rent (if any) of any house or land

(1) [1914] 2 K. B. 497.

occupied by such person. Opposite the signature of the appellant in this book, under the heading of "Things to be supplied," there is a list containing, amongst other things, coal, lamps, tools, and subscriptions to various accident or hospital funds. The prima facie inference from this document is not only that the appellant is to be entitled to a wage, but that the wage is payable by the respondent company. Otherwise deductions by the respondent company from the wage in respect of things supplied, work done, or subscriptions paid would be impossible. In order to see whether this inference is correct we must go to the by-laws which both parties have undertaken to fulfil and perform. These by-laws, with one exception, are consistent with their being intended to relate only to persons employed by the respondent company. The first provides that every person employed in the colliery is to sign this contract of service, which prima facie must refer to a contract with the respondent company. The second provides that all persons employed shall be entitled to and shall receive wages and payment at the current rate of wages for the time being paid at the colliery. This is a clear contract that the appellant shall receive wages, and there is nothing so far to rebut the inference that the wages which are to be paid are payable by the respondent company.

By the third by-law the respondents are to provide all persons employed with work while such persons are in their employment. In this, again, all persons employed are contemplated as being in the employment of the respondent company. The fourth by-law provides for the termination of the employment by notice on either side, which clearly contemplates a termination by the respondent company. By-laws Nos. 5 to 10 inclusive impose various obligations on persons employed. By-law No. 11 provides for keeping various classes of coal separate, and by-law No. 12 provides for deductions in the case of any breach of the preceding by-law, the amount of such deductions to be determined as therein mentioned. The deductions here referred to must be deductions from wages, and the inference again is that the person to pay the wages is the respondent company. The fourteenth by-law provides that wages shall be payable weekly on Saturday, accounts being made up to the previous Wednesday. Notice of any error is to be given to the respondent company within the period therein specified. In default of such notice neither party

H. L. (E.) 1916

CHURM v. DALTON MAIN COLLIERIES, LIMITED.

Lord Parker of Waddington.

—which must mean neither the employed nor the respondent company—can reopen the account. This by-law again contemplates that the wages of the employed are payable by the respondents. By-laws 15 to 18 inclusive contain nothing to suggest that they relate to any persons not employed by the respondent company. The only by-law inconsistent with the by-laws relating solely to persons employed by the respondent company, or with the wages payable to such persons being payable by the respondents, is by-law No. 13, on which great stress was laid in argument.

This thirteenth by-law does certainly create some difficulty. It provides that all persons working under or for, and paid by, contractors or other persons shall be deemed to be the servants of the owners of the colliery to the extent only that they shall be bound to obey the by-laws and the other rules of the colliery, but the owners of the colliery shall not be bound to see to the payment of, or be liable for, the wages due to such persons after they have paid the contractor or other person for whom such persons work. The first part of this clause appears to be directed to making persons who are in no sense employed by the respondents the servants of the respondents for certain purposes, and there is evidence that contractors' servants are called on to sign the signing-on book. A person working under or for, and paid by, a contractor might, by so signing, become bound by such by-laws as by-law No. 7, which is directed against quarrelling or making any disturbance in the mine or smoking in working hours, but it is difficult to suppose that the intention was to make such persons bound by such by-laws as No. 4, as to being discharged from work by notice, or by-law 12, as to deductions from wages, or by-law 14, as to settled accounts.

The second part of by-law 13 is, however, not so easy to explain. It might be suggested, of course, that it is inserted per cautelam, for fear the first part of the clause should impose any obligation to pay wages on the company, but the suggestion is not very satisfactory, for the clause is framed on the footing that the respondents will be bound to see to the payment of the wages due from the contractor unless or until such contractor shall have been paid by them. In other words, it proceeds on the footing that if the respondents contract for a shaft at the price of 1000*l.*, payable when the work is completed, they will have to see to the payment of the

contractor's employees pending completion. It would be extravagant, however, to suppose that this was meant. I cannot help thinking that the by-law is framed to meet two points, namely, (1.) to make persons not employed by the company bound to obey certain of the by-laws, and (2.) to prevent persons employed by the company from demanding their proper wage after such wage had been already paid to some ganger or foreman on their behalf. If so, it has failed in its object by faulty draftsmanship. However this may be, I do not think that by-law 13 is sufficient to displace the inference arising from the documents that the appellant was employed by the respondent company for wages payable by the respondent company, though for the amount of the wages one has to go to the price list, which contains the current wages for the time being paid at the colliery.

If this price list be examined it will be found that it provides that both colliers and fillers are to be paid together by piece work, that is to say for getting and filling best coal, per score of ten tons, 13*s.* 4*d.*, but there is no provision how the amount is to be apportioned between collier and filler, or to whom it is to be paid. It is clear, however, that it is to be paid by the respondents, who are also to provide every collier or filler who is a householder with a ton of house coal per month.

My Lords, the collier with whom the appellant worked during the week for which he is now claiming to be entitled to a minimum wage under the Act had signed, as indeed all colliers employed by the respondents do sign, contracts in the same terms as those signed by the appellant. There is nothing on the face of the documents to distinguish in any way the position of collier from the position of filler, and everything which I have already said with respect to the relationship between the respondents and the appellant is therefore equally applicable to the relationship between the respondents and the collier with whom the appellant was working during the week in question. The result is, I think, that the joint wage payable to collier and filler for getting and filling the coal was, at any rate so far as the documents are concerned, payable by the respondents to their joint receipt, the apportionment being left to mutual agreement between them. It remains, however, to be considered how far, if at all, this result is displaced or modified by the customary course

H. L. (E.) 1916

CHURM v. DALTON MAIN COLLIERIES, LIMITED.

Lord Parker of Waddington.

of dealing between the respondents and their employees at this particular mine.

My Lords, it appears that in the Silverwood Colliery colliers and fillers work in sets consisting of one collier and one filler. There may, however, be more than one set working in any one stall. Each stall has its particular number, and on every pay-day a pay-note for the whole stall is made out by the respondents and expressed to be payable to the collier or one of the colliers engaged in that stall. In this pay-note a stall is credited (1.) with the price of the total amount of piece work done in the stall during the week, and (2.) with the day wage of any collier or filler taken by the respondents from the stall for other work during the week. On the other hand, the stall is debited with all deductions which the respondents claim to make under the particular contracts with each and every person engaged in the stall. For example, the rent payable by any person occupying one of the respondents' cottages, the 4*d.* per man payable under the Insurance Act, the price of tools supplied or repaired, or subscriptions paid. The note thus made out would show a balance which the collier to whom it was handed could obtain from the company's pay office. This balance would be divided between the persons engaged in the stall in such proportions as might be agreed, each giving credit for the deductions made on his account.

There seems to have been an equal division between the sets of more than one engaged in the stall, but as between collier and filler forming a single set the filler's share was somewhat less than the collier's. Thus the collier would get, roughly speaking, 5*s.* to the filler's 4*s.* for every day of work, though the exact proportions might be varied by mutual agreement. Under these circumstances, although the collier's hand was the hand which actually paid the wages of the filler, such wages were in truth and in fact always paid by the respondent company. Beyond the payment by the collier to the filler, I cannot find anything in the evidence pointing to the relationship between collier and filler being that of employer and employee. Indeed, the evidence points to a contrary conclusion, for had the collier been the real employer of the filler one would have expected the respondents not only to deduct the 4*d.* payable for insurance by collier and filler respectively, but also the 3*d.*

payable under the Insurance Act by the collier as employer of the filler, and no such deduction was ever made. Indeed, the respondents admitted very candidly that in all respects other than the payment of wages they were the employers of the filler, and that the collier was, if such employer, only so to the extent of being bound to pay the wages. I cannot, therefore, see that there is anything in the customary practice prevailing at the Silverwood Colliery to displace or alter the inference arising from the documents that the respondents are the appellant's employers for wages.

The respondents contended that the collier was in the present case responsible for the appellant's minimum wage. But how in any real meaning of the words could it be said that the filler was employed underground in the Silverwood Mine by the collier? The collier did not engage him, nor could he dismiss him, nor had he any control over his work. There was nothing which he had the right to order him to do, nor could he object to his carrying out any order given by the respondents. Such contract (if any) as existed between them was confined to a division of the moneys paid by the respondents for their joint wage. I cannot think that this would be sufficient to bring the collier within s. 1 of the Coal Mines (Minimum Wage) Act, 1912.

My Lords, I think it is worth while calling attention to the following point: Suppose both filler and collier entitled to a minimum wage under the Act, and that their joint earnings are insufficient to provide it, the respondents admit their liability to provide the deficiency. Suppose on the other hand, as in the present case, the collier has disentitled himself to his minimum, then, if the respondents' contention be correct, they not only escape the obligation of making provision for the minimum wage of the collier, but throw upon him the obligation of providing the minimum wage of the filler. It would be an anomaly if the collier were subject to this double penalty.

My Lords, I should like to add that all that I have said relates only to the facts in this particular case. It is easy to imagine cases in which the collier might really be in the position of a contractor with the company, engaging and providing his own fillers, and paying them such wages as might be agreed. In such a case it might be impossible to conclude that the filler was in any sense

H. L. (E.) 1916 CHURM v. DALTON MAIN COLLIERIES, LIMITED.

whatever employed by the colliery owner, and consequently the collier might be the person liable under s. 1 of the Act. Both the *Wrexham Case* (1) and the recent case of *Hooley* v. *Butterley Co.* (2) may possibly be justified on this ground, but it would serve no useful purpose to examine the facts of those cases in detail.

I think this appeal should be allowed.

LORD SUMNER. My Lords, the terms of the appellant's employment by the respondent colliery (for admittedly he was in their employment) are to be collected partly from the conduct of the parties concerned, namely, the colliery officials, the collier, Fuller, and the filler, Churm, and partly from the colliery by-laws. No point has been taken that such evidence was inadmissible or that the contract was to be collected from the written and printed documents alone. The first is matter of testimony, the second of construction. If the colliery company have to pay wages to Churm, or, more precisely, if they are his debtors for his wages, the appeal succeeds. This the respondents recognize, for they would then in any view of the Coal Mines (Minimum Wage) Act, 1912, be employers of Churm within s. 1, sub-s. 1.

The learned judge at the trial found that Fuller was not Churm's debtor for his wages, and the balance of the evidence supports him. In practice, it seems, the collier and filler agree to share the sum handed over by the colliery company to the collier, which they have jointly earned according to the price list for coal gotten and brought forward. I do not suppose that the colliery officials are ignorant of the proportions in which the sum is usually shared, but they are not parties to the division. There was no evidence that if the collier does not receive enough to pay the filler's agreed share he has to make up the amount out of his own pocket. There was evidence that a filler had prosecuted a collier who received from the colliery company the whole wages of the set and ran away with the money, but this was done at the instance of the colliery company, and, as Bailhache J. pointed out, is consistent with the view that the filler had made the collier his agent to receive his wages from the colliery company along with the wages of himself and

(1) [1914] 2 K. B. 497. (2) 84 L. J. (K.B.) 1969.

possibly of others. It is not consistent with the view that what money the collier got from the company was to be his own, and that he was then to be merely a civil debtor to his filler for an agreed remuneration or wage. It is true that experienced colliery managers testified that in practice, at this and at other Yorkshire pits, the filler looks to the collier for his wages and not to the company, but I think this represents not so much what is actually done as the witnesses' view of the legal effect of what is actually done. The learned judge did not accept it, nor am I prepared to say that on the particular evidence given in this case he was wrong. So much for the evidence of conduct and course of business.

The other elements, from which the bargain has to be ascertained, are written documents. Their construction is matter of law. Really they are by-laws 2 and 13. The contracts evidenced by the signing-on book are contracts severally entered into between each signatory employee and the colliery company, to which the other signatory employees are strangers. There is not one multipartite agreement arising between all the employees inter se as well as with their employer. The contracts are several. This being so, the promise of the owners of the colliery, expressed in the signing-on book, that they will perform the by-laws must, as applied to by-law 2, be either a promise to pay Churm wages according to the current rate as their own primary liability, or a promise by way of secondary liability that the collier, whoever he may be, shall so pay wages to Churm. I think it cannot be the latter. The language of by-law 2 is ill adapted to a guarantee. By-law 13 is inconsistent with a guarantee, for it is an attempt to provide that the colliery company, as between itself and Churm, shall have nothing at all to do with wages; whether that attempt is successful or not is a question. Finally, no one has suggested a guarantee, and the whole course of business negatives it. From this it follows that by-law 2 introduces a contract in writing, by which the employers, the colliery company, are debtors for his wages to the filler, Churm, though their amount is indeterminate and is to be determined aliunde. So far the colliery company would be employers who are under a contractual liability to pay wages to the workman, and within the Coal Mines (Minimum Wage) Act, 1912. Is there anything to rebut this? It is the critical point of the case.

H. L. (E.)
1916
CHURM
v.
DALTON MAIN COLLIERIES, LIMITED.
Lord Sumner.

I think that in the Court of Appeal there was some difference of view between Buckley L.J. and the other members of the Court at this point. The two latter simply followed the decision in *Richards* v. *Wrexham and Acton Collieries* (1) and other decisions of the Court of Appeal. They considered the *Wrexham Case* (1) to be on all fours with the present case. I do not think so. The foundation of that case is the fact that in actual practice the collier owed the filler his wages. He recognized his debt and paid it out of his own pocket, whether the money he had received from the colliery company was sufficient to cover it or not. Further, the filler got a day wage from the collier; whereas here collier and filler share in their own fashion a piece rate wage, the joint product of their joint work. Thus in the *Wrexham Case* (1) the Court of Appeal started with the fact of an employer who was under a contractual obligation to pay wages to the filler and was not the colliery company, and the question was whether the colliery company nevertheless were employers within the section for other reasons. I agree with my noble friend Lord Parker of Waddington that the correctness of the *Wrexham Case* (1) does not now arise for consideration. Here, as I take the facts proven at the trial to be, the case is the converse. The colliery company, and no one else, are the employers at wages in actual practice, and the question is, are they nevertheless not employers at wages within the section for other reasons? *Hooley* v. *Butterley Co.* (2) is also distinguishable. There was no evidence of any express agreement as to the obligation to pay wages, and the Court held that the contractual relations between the parties had been reduced into and were solely to be found in the written documents; but while the by-laws there contained an exoneration similar to the present by-law 13, they contained nothing equivalent to the initial promise of wages contained in the present by-law 2. It is for present purposes simply a decision that documents similar to yet differing from those now before your Lordships did not on their true construction contain any promise by the colliery company to pay. Similarly in *Higginson* v. *Blackwell Colliery Co.* (3) the rules incorporated into the contract contained in the signing-on book were held not to embody any obligation

(1) [1914] 2 K. B. 497. (2) 84 L. J. (K.B.) 1969.
(3) 84 L. J. (K.B.) 1189.

upon the colliery company to pay wages to the plaintiff dayman, and on the parol evidence the county court judge had found that no contract by the company to pay him wages had been proved. This case is, therefore, distinguishable also. Though this system of employment conforms to a common type, there are variations between the practice in one colliery and another, and even in the case of the same colliery the effect of the evidence given at one trial may differ essentially from that given at another. Sometimes too much is taken for granted at the trial, and in the case of a familiar course of business detailed evidence about it is dispensed with. Still in the result each of these decisions must be considered strictly in the light of the circumstances proved or admitted in the case.

On the other hand, in Buckley L.J.'s view, the case made below was that the collier and filler between them fixed behind the company's back what the company were to pay to and for the filler, and this he rejected. If these were the facts I should agree, but I think that the true view of the practice, as given in evidence on this occasion, is that the colliery company, by arrangement with both men, placed in the hands of one the price of their joint work and so made an end of it. The Coal Mines (Minimum Wage) Act, 1912, was passed long after practices of this kind had become established. Its effect on the established practice, whatever that practice may be proved to be, is another matter. There is, of course, nothing, either in law or in business, to prevent a master from being liable to two wage-earners who work together and from paying an aggregate wage, which they are to divide between themselves as they may agree.

If by-law 2 makes the colliery company employers of the filler at wages, and debtors to him for wages, though for an amount to be fixed, so far as he is concerned, in a special way, the remaining question is whether by-law 13 is adequate to negative this position.

On the evidence in the present case it is clear that, if the filler has no contract with the colliery company for wages as such, he has none with anybody. When the collier has received the money from the colliery company possibly the filler might recover his agreed share as money had and received to his use, and it may be that this has been found sufficient. At any rate this circumstance is not conclusive.

H. L. (E.) 1916 CHURM v. DALTON MAIN COLLIERIES, LIMITED. Lord Sumner.

In law, however, the matter turns on by-law 13, and I do not think it adequate to abate the promise to pay wages contained in by-law 2. Possibly a differently worded by-law might achieve this object. Whether or not the collier is a " contractor " appears to depend on the question whether the filler is employed by him, a case contemplated by the Coal Mines (Weighing of Minerals) Act, 1905, s. 2, sub-s. 2; but in any case I think he is within " other persons," and that fillers are persons " working under and paid by " other persons. I am not prepared to make a distinction between " working under " and " working with." The filler is proved to be sufficiently " under " the collier for the purpose of this by-law. The ejusdem generis rule does not apply. There is no genus of which " contractors " are one species and " other persons " another. When, however, the terms of the by-law are examined I think the matter becomes clear. The first part is negative or restrictive and the second affirmative. Why should the owners of the colliery negative the possibility of their being bound to see to the payment of wages due to Churm not from themselves but from the collier ? How could such a case arise ? The expression is " see to the payment of," not simply " pay," and " after they have paid the other person for " (which includes " under ") " whom such persons work."

Applied to this case and the proved practice this plainly means that after they have paid Fuller the owners have not to see to the payment of anything by Fuller to Churm ; in other words, payment to Fuller of the sum due to Churm discharges the company from their debt to Churm, and it does so none the less if at the same time they pay Fuller what they owe him all in one payment. If upon this the company were to raise a plea of payment they would fail to prove any discharge of their debt to Churm. They made a gross payment, but they leave it in doubt whether it was payment in full of the wages legally due to Churm, and a short payment to Fuller (which we may be sure that in fact it was not), or whether the wages short paid were Churm's. On the facts as they leave them they are not shown to have ever paid to any one the full amount to which Churm is entitled under the Act, and accordingly by-law 13 has never come into operation and does not avail them.

My Lords, even if this interpretation were doubtful, which I think it is not, by-laws 2 and 13 seem to me to be ambiguous and

to fall precisely within the words of Lord Macnaghten in *Elderslie Steamship Co.* v. *Borthwick* (1): "I am unable to reconcile the two clauses. In such a case as this an ambiguous document is no protection." The colliery company have prepared their own by-laws and incorporate them by reference into the contract which is signed. By one by-law they promise wages; by another they try to stipulate that in certain cases they are to be deemed to have promised none, but they do this in a halting fashion, which, if it does not bear the above interpretation, bears no clear interpretation at all. I think, therefore, that the appeal succeeds, and I concur in the motion proposed by the Lord Chancellor.

Order of the Court of Appeal reversed and order of Bailhache J. restored. The respondents to pay the costs in the Courts below and also the costs of the appeal to this House.

Lords' Journals, January 28, 1916.

Solicitors for appellant: *Corbin, Greener & Cook, for Raley & Sons, Barnsley.*

Solicitors for respondents: *Johnson, Weatherall & Sturt, for Parker, Rhodes & Co., Rotherham.*

(1) [1905] A. C. 93, 96.

[HOUSE OF LORDS.]

H. L. (E.)* 1916 Jan. 27.

BRITISH AND FOREIGN MARINE INSURANCE COMPANY, LIMITED . . . . . } Appellants;

AND

SAMUEL SANDAY & CO. . . . . Respondents.

Insurance (Marine)—Constructive Total Loss of Goods—Restraint of Princes—Declaration of War—Frustration of Contemplated Adventure—Marine Insurance Act, 1906 (6 *Edw.* 7, *c.* 41), *ss.* 26, 60; *s.* 91, *sub-s.* 2.

Two British vessels laden with merchandise belonging to British merchants for sale in Germany were on a voyage from the Argentine to Hamburg when war broke out between the United Kingdom and Germany and the further prosecution of the voyage became illegal. The cargo owners had insured the goods on both vessels by identical voyage policies in the ordinary form, and the perils insured against included restraints of princes. Shortly after the outbreak of the war the vessels were directed (in one case by a French cruiser and in the other case by the shipowners at the suggestion of the Admiralty) to proceed to British ports, which they did. The cargo owners warehoused their goods and gave notice of abandonment to their underwriters, claiming on a constructive total loss:—

Held—(1.) that the rule that, where goods are insured by a marine policy at and from the port of loading to the port of destination, the frustration of the voyage by the detention of the goods for an indefinite time by a peril insured against entitles the owner, on giving notice of abandonment, to recover as for a constructive total loss has not been altered by the Marine Insurance Act, 1906, and still prevails; (2.) that the loss was directly caused by His Majesty's declaration of war, which was a restraint of princes within the meaning of the policies.

Held, therefore, that there was a constructive total loss of the goods on both ships by a peril insured against, and that the cargo owners were entitled to recover.

Decision of the Court of Appeal [1915] 2 K. B. 781 affirmed.

Appeal from an order of the Court of Appeal affirming a judgment of Bailhache J. (1).

The action was brought by the respondents to recover the sum

* *Present:* Earl Loreburn, Lord Atkinson, Lord Shaw of Dunfermline, Lord Parmoor, and Lord Wrenbury.

(1) [1915] 2 K. B. 781.

of 44,800*l.* under policies of marine insurance dated July 31, 1914, with the appellants on linseed and wheat per the steamships *St. Andrew* and *Orthia*. The action was tried upon an agreed statement of facts.

The respondents were a British firm of corn merchants carrying on business in England. In July, 1914, they shipped 51,998 bags of linseed and 1632 bags of wheat on board the British steamer *St. Andrew* at the ports of Rosario, San Nicolas, and Buenos Aires for carriage to Hamburg. Of these goods the respondents had contracted to sell the linseed to German merchants at a price which covered cost, freight, and insurance, but upon terms by which the property did not pass to the purchasers until delivery, and they intended to sell the wheat also in Germany. By a policy of marine insurance dated July 31, 1914, the respondents insured the said parcels of linseed and wheat with the appellants, who were a British company, "at and from ports in the River Plate and/or tributaries to Hamburg," and the subject-matter of the policy as between the insured and the said company was declared to be: "Linseed valued at 33,000*l.*; wheat do., 800*l.*—33,800*l.*" The usual "free from capture and seizure" clause was deleted and an increased premium was paid accordingly. Among the perils insured against were "takings at sea, arrests, restraints, and detainments of all kings, princes, and people of what nation, condition, or quality soever."

On August 4, 1914, war broke out between the United Kingdom and Germany, and Proclamations of the King against trading with the enemy were issued on August 5 and September 9. On August 9, as the *St. Andrew* was approaching the Lizard, she was stopped by a French cruiser and told to go to Falmouth for security. At Falmouth she received directions to proceed to Liverpool. She arrived at Liverpool on August 11 and discharged her cargo. The respondents took delivery of their goods and stored them.

In July, 1914, the respondents also shipped 17,898 bags of linseed at Rosario on board the British steamship *Orthia* for carriage to Hamburg, and by a policy of marine insurance, also dated July 31, they insured the linseed with the appellants. This policy was in identical terms with the other, except that the linseed was valued at 11,000*l.*

On August 3 the owners of the *Orthia* received a telegram from the

H. L. (E.) 1916

BRITISH AND FOREIGN MARINE INSURANCE COMPANY, LIMITED v. SAMUEL SANDAY & Co.

Admiralty suggesting in the interests of the nation that the *Orthia* should be diverted to a British port, and accordingly on August 5 they cabled to St. Vincent directing the *Orthia* to proceed to Glasgow. The captain received this cable on August 7 when he called at St. Vincent for bunkers. The *Orthia* arrived at Glasgow on August 20 and there discharged her cargo. The respondents took delivery of their goods and stored them. On September 7 the respondents gave notice to the appellants abandoning the goods to them under both policies as a total loss. On September 9 the appellants refused to accept the abandonment, but they took no objection that the notice of abandonment was out of time.

Bailhache J. decided that on the admitted facts there was a constructive total loss of the goods proximately caused by perils insured against, namely, restraints of kings, princes, and people, and gave judgment for the respondents for the amount claimed; and the Court of Appeal, by a majority (Lord Reading C.J. and Bray J., Swinfen Eady L.J. dissenting), affirmed this decision.

1915. Nov. 30; Dec. 2, 3. *Sir Robert Finlay, K.C.*, and *Leslie Scott, K.C.* (with them *F. D. MacKinnon, K.C.*), for the appellants. Two questions are raised by this appeal: 1. Whether the declaration of war was a restraint of princes within the meaning of the policies. 2. Whether the Marine Insurance Act, 1906, has not put an end to the doctrine of constructive total loss by the detention of the goods by a peril insured against such as to cause the frustration of the voyage.

As to 1: The cause of the loss is said to be the declaration of war, which made it illegal at common law to continue the voyage. But to constitute a restraint of princes there must be a display of force which leads to submission. Force must be either actually exerted or immediately apprehended. These vessels were turned aside because the supervention of a state of war rendered the prosecution of the voyage illegal at common law. They never got within the range of actual restraint. The Court of Appeal relied on the fact that the declaration of war was an executive act of the British Government, but the same result would have arisen if the declaration had come from Germany, or if the war had broken out without any declaration, and it is remarkable that no authority can be found

in favour of the view of the Court of Appeal, although this question must have frequently arisen in the Napoleonic and subsequent wars. To entitle the assured to recover the act which causes the loss must be an act of arrest, restraint, or detainment, and must not be the result of the operation of the law of the land. A declaration of war is not an act of restraint at all, but brings about a state of war which involves certain legal consequences, one of which is that a subject is not allowed to trade with the enemy; and the same consequence emerges although there is no executive act of the Government at all to bring the war into existence. There is a distinction between a restraint by operation of law and a restraint by the executive act of the Government. The declaration of war does not operate proximately on the parties to the venture. A mere voluntary obedience to the law of the land does not fall within the words "arrests, restraints, or detainments of princes." "Restraints of princes and rulers means the act of a State or Government interfering with a strong hand": per Martin B. in *Finlay* v. *Liverpool and Great Western Steamship Co.* (1); and see Arnould on Marine Insurance, 2nd ed., vol. 2, p. 836, s. 308. *Miller* v. *Law Accident Insurance Co.* (2) is distinguishable, because, although the restraint in that case was one of the municipal law, there was there an active intervention of the Executive Government. Here the loss was caused by the voluntary turning aside from the adventure to avoid the peril, and not by the peril itself: *Hadkinson* v. *Robinson* (3); *Lubbock* v. *Rowcroft* (4); *Kacianoff* v. *China Traders Insurance Co.* (5)

As to 2: Before the passing of the Marine Insurance Act, 1906, a detention of goods for such a time as to frustrate the adventure was treated as a constructive total loss of the goods, but on the other hand a detention causing the loss of the season for the goods was not so treated. The authorities on this point being in this unsatisfactory state, the intention of the Legislature in the Marine Insurance Act, 1906, was, it is submitted, wholly to abolish constructive total loss of goods by the frustration of the venture. That Act is an amending as well as a consolidating Act, and the

(1) (1870) 23 L. T. 251, 254.
(2) [1902] 2 K. B. 694; [1903] 1 K. B. 712.
(3) (1803) 3 Bos. & P. 388.
(4) (1803) 5 Esp. 50.
(5) [1913] 3 K. B. 407; [1914] 3 K. B. 1121.

H. L. (E.) 1916

BRITISH AND FOREIGN MARINE INSURANCE COMPANY, LIMITED v. SAMUEL SANDAY & CO.

sole question is what the Code says. The reasonable inference from the language of the Act is that an alteration of the law was intended. Sect. 60 contains a complete and exhaustive definition of constructive total loss, and, as it does not include in that definition constructive loss of the goods by the frustration of the venture, it impliedly excludes it. This view is supported by the fact that the section uses the same language as to the ship and the goods, and it is conceded that the ship was never subject to this rule as to the frustration of the venture. Looking at the terms of this section, it is reasonable to infer that if the Legislature had intended to continue the rule in regard to goods it would have inserted some express provision to that effect. Sect. 91 preserves the rules of the common law, including the law merchant, save in so far as they are inconsistent with the express provisions of the Act, but the common law rule as to the insurance of goods covering the venture is inconsistent with s. 60, and therefore s. 91 does not apply. Sect. 26 provides that the subject-matter insured must be designated in the policy with reasonable certainty, but that regard shall be had to any usage regulating the designation of the subject-matter insured. Here the subject-matter is the goods, and there is no usage established that the venture is insured under the designation of the goods. This Act, having regard to the language used, ought not to be read as perpetuating an erroneous interpretation of the law. [They also referred to *Stephens* v. *Australasian Insurance Co.* (1) and *Mackenzie* v. *Whitworth.* (2)]

Adair Roche, K.C., and *Robertson Dunlop*, for the respondents. 1. As to constructive loss: The authorities show that if the goods can never arrive at their destination that is an actual total loss, but if by reason of a war they are detained for an indefinite time that is a constructive total loss, because it cannot be said that the goods will never arrive although it is very improbable: *Barker* v. *Blakes* (3); *Anderson* v. *Wallis* (4); *Cologan* v. *London Assurance Co.* (5); *Roux* v. *Salvador* (6); *Rodoconachi* v. *Elliott* (7); *Miller* v. *Law Accident Insurance Co.* (8); Arnould on Marine Insurance,

(1) (1872) L. R. 8 C. P. 18.
(2) (1875) 1 Ex. D. 36.
(3) (1808) 9 East, 283, 293.
(4) (1813) 2 M. & S 240.
(5) (1816) 5 M. & S. 447.
(6) (1836) 3 Bing. N. C. 266, 278–279.
(7) (1874) L. R. 9 C. P. 518, 522.
(8) [1903] 1 K. B. 712, 718.

2nd ed., vol. 2, p. 1125; Phillips on Insurance, 5th ed., vol. 2, p. 306, s. 1598. The Marine Insurance Act, 1906, has not altered the law in this respect, because (1.) the instances of constructive loss in s. 60 are not intended to be exhaustive, and (2.) s. 91, sub-s. 2, in terms preserves the rules of the common law, including the law merchant, and the rule that an insurance of the goods is the insurance of the voyage is not inconsistent with the express provisions of the Act: see also s. 26, sub-ss. 3 and 4. It is not relevant to say that the Act has altered the law in some other respect. [Upon this point they referred to *Angel* v. *Merchants' Marine Insurance Co.* (1); *Macbeth & Co.* v. *Maritime Insurance Co.* (2); *Hall* v. *Hayman.* (3)]

2. As to restraints of princes: It was the declaration of war which forbade the owners of the vessel and the owners of the cargo from proceeding further on the venture. "A declaration of war imports a prohibition of commercial intercourse and correspondence with the inhabitants of the enemy's country": per Willes J. in *Esposito* v. *Bowden.* (4) The Prize Court way of dealing with a person who has intercourse with the enemy is to confiscate his ship, and the reason is that he has thereby turned himself into an enemy. Such intercourse, except with the licence of the Crown, is illegal, and the permission to trade is pro tanto a suspension of the state of war: *The Hoop.* (5) It is said that it is the common law which prohibits the trading, but it is the declaration of war which brings the common law into operation. Whether the prohibition results from the operation of the common law or of the municipal law, it is equally a restraint of princes, but in the one case it is an executive act and in the other a political act. To constitute a restraint of princes it is not essential that there should be the presence of force as distinguished from an order backed by the sanction of force. It was the act of the King which stopped this venture. *East Asiatic Co.* v. *S.S. Tronto Co.* (6) and *Rotch* v. *Edie* (7) are illustrations of restraints of princes. *Hadkinson* v. *Robinson* (8) is distinguishable on the ground that in this case the master was not

(1) [1903] 1 K. B. 811.
(2) [1908] A. C. 144.
(3) [1912] 2 K. B. 5.
(4) (1857) 7 E. & B. 763, 779.
(5) (1799) 1 C. Rob. 196, 199.
(6) (1915) 31 Times L. R. 543.
(7) (1795) 6 T. R. 413.
(8) 3 Bos. & P. 388.

H. L. (E.) 1916

BRITISH AND FOREIGN MARINE INSURANCE COMPANY, LIMITED v. SAMUEL SANDAY & CO.

taking steps to avoid the particular peril but was submitting to its operation.

Leslie Scott, *K.C.*, in reply referred to *Inman Steamship Co.* v. *Bischoff* (1) and *Cory & Sons* v. *Burr*. (2)

The House took time for consideration.

1916. Jan. 27. EARL LOREBURN. My Lords, when the present war commenced the *St. Andrew* and the *Orthia*, both of them British ships, were on a voyage from the Argentine to Hamburg, a German port, laden with merchandise. On learning that war had broken out between Great Britain and Germany, whereby the taking of these goods to Hamburg had become unlawful, the masters properly desisted from the voyages, and the cargo owners warehoused their merchandise and gave notice of abandonment to their underwriters, claiming on a constructive total loss. These notices were not accepted, and this action is brought to enforce the claim. There is no distinction between the two ships, and both policies are of a like tenor.

Two questions have been argued before your Lordships. Other contentions, raised in the Courts below, have not been raised here. The first question is whether the old rule still prevails, that upon an insurance on goods, substantially in the words of these policies, the frustration of the adventure by an insured peril is a loss recoverable against underwriters, though the goods themselves are safe and sound. The second question is whether, under the circumstances, there was here a loss by restraint of kings, princes, and peoples, which is one of the perils insured against in these policies.

In 1906 it was well settled that when goods are insured in a policy worded as these policies are, at and from the port of loading to the port of destination, there is a loss if the adventure is frustrated by a peril insured. It is not merely an insurance of the actual merchandise from injury, but also an insurance of its safe arrival. There is no doubt that this was the rule which had been acted upon for very many years. Was it altered by the Marine Insurance Act, 1906 ? Swinfen Eady L.J. thought it was, and he cited instances in which

(1) (1882) 7 App. Cas. 670 (2) (1883) 8 App. Cas. 393.

this Act, though a consolidation Act, had in his opinion altered the law in other respects. I will not pursue that subject, because it has no bearing on the question whether or not there has been an alteration in this respect, even if it appears, on an examination of the cases to which he refers, that the Act has altered what, at the time of its passage, was the highest judicial interpretation of the law. Howbeit, I do not think the Act altered the law in the particular now under consideration, namely, in regard to the old rule I have mentioned.

Sect. 60 of the Act says "there is a constructive total loss where the subject-matter insured is reasonably abandoned on account of its actual total loss appearing to be unavoidable." Sect. 57, sub-s. 1, says "where the assured is irretrievably deprived" of the subject-matter assured there is an actual total loss. Now here the subject-matter assured, as the law stood in 1906, included the adventure and not merely the goods, and the party assured was irretrievably deprived of it because all prospect of safe arrival on the voyage to Germany was hopelessly frustrated by the outbreak of war. Therefore the assured party reasonably abandoned because actual total loss appeared to be unavoidable. So far I see nothing in the Act to alter the law, but I do see that under the old decisions there is a constructive total loss.

The argument, however, is that the "subject-matter insured" on such a policy no longer included the adventure. There is not a line in the Act which says so, and, if it were relevant, many reasons might be urged against the probability of so inconvenient a change being made. But it is conclusive to point out that s. 26 says "The subject-matter insured must be designated in a marine policy with reasonable certainty," and, further, "In the application of this section regard shall be had to any usage regulating the designation of the subject-matter insured." There are many things that may be at risk, and in respect of which insurance may be effected—ship, goods, freight, profits, and so on. There are also familiar, even antique, expressions constantly used from long ago in marine policies, and continued because they are well understood in the business, or have been interpreted by judges. This section says that regard is to be had to any usage regulating the designation of the subject-matter assured. The words of this policy have for generations

H. L. (E.) 1916

BRITISH AND FOREIGN MARINE INSURANCE COMPANY, LIMITED v. SAMUEL SANDAY & CO.

Earl Loreburn.

been understood and held by judges to designate not merely the goods, but also the adventure. So far from abrogating this designation of subject-matter I should have thought the Act took pains to preserve it and others like it.

I will merely in a sentence refer to s. 91, sub-s. 2, of the Act, which preserves the rules of the common law, including the law merchant, save in so far as they are inconsistent with the express provisions of this Act. It seems to me that Parliament has triply guarded against the danger that the Act should be construed in the sense urged upon us by Sir Robert Finlay. It has refrained from saying that the old rule shall be altered. It has twice warned us that we are to regard and preserve rules and usages in terms that are applicable to this rule.

Accordingly, I take with me the conclusion that the adventure was a subject-matter insured, when I proceed to inquire whether or not the loss of it is to be compensated under the clause protecting the assured against restraint by kings or princes.

We were told that this question has never been judicially determined. It is a difficult question, and I have been much struck by the cogent reasoning of Swinfen Eady L.J.; but the argument has in the end satisfied me that the decision of the Court of Appeal ought to be affirmed.

A declaration by His Majesty that there was a state of war was issued on August 4, 1914, and thereupon a number of things theretofore lawful became unlawful. Among other things, trading to German ports became unlawful, and an instant duty arose for these two ships to discontinue their voyage to Hamburg. The adventure of carrying this merchandise to its destination became in law a serious offence, and, in fact, impracticable. That the declaration was an act of State cannot be doubted. The real point made by the underwriters was that the declaration of war did not directly restrain the ships from proceeding to Hamburg, or the owners of goods from taking them there. They argued that the declaration set up a state of war, and the general law applicable to that state thereupon came into force, and it was not the declaration but the consequence of it which destroyed their enterprise. To hold otherwise, they said, would be to throw upon underwriters an insurance against the consequences of war. In their contention,

though the actual exercise of force might not be necessary, yet the fear of its being used must be present if there is to be a loss by restraint of princes, and here there was neither force nor the fear of it, for the voyage was abandoned simply because it had become unlawful, and the assured obeyed the law. The proximate or direct cause of the loss was, they said, simply the law of the land.

My Lords, I am not pressed by the circumstance that force was neither exerted nor present, for force is in reserve behind every State command. And it would be a strange law which deprived the assured, if otherwise entitled to his indemnity, upon the ground that he had not resisted, till the hand of power was laid upon him, an order which it was his duty to obey. If it were an order which he was not bound to obey, and which he might have successfully resisted either by violence or by process of law, a question might arise whether or not there had been in fact a restraint. But that is outside the present case, and I say nothing of it. What has given me some anxiety is the argument that His Majesty's declaration was not the direct cause of these adventures being destroyed. The maxim Causa proxima non remota spectatur has been strictly applied in marine insurance cases. And properly so, for there are a variety of perils that may lead to a loss either partial or total, some of them, it may be, covered and others not covered by a policy, and a variety of events or causes that may contribute to a loss, so that without straining language it will be possible to treat it as due either to an insured or to an excepted peril.

That, I take it, is the reason why this maxim is pushed to considerable lengths in marine insurance law. In view of that, ought we to say that His Majesty's declaration was the direct cause of these adventures being frustrated, or ought we to say that it merely created a state of war which brought into activity a new set of duties and prohibitions, and that one of them, the prohibition against trading with the enemy, necessitated the adventure being wholly given up? Did the interruption directly come from the declaration or from the law which it awakened? In a sense it came from both, but we must choose which was the proximate cause, for one is the subject of insurance and the other is not.

I can see how far-reaching a decision in the former of these senses may prove, but I think it is the right decision. I do not see

H. L. (E.) 1916

BRITISH AND FOREIGN MARINE INSURANCE COMPANY, LIMITED v. SAMUEL SANDAY & CO.

Earl Loreburn.

my way to separating the act of State from its sequel and treating the advent of war conditions as a last distinct link in the chain of causes which brought these voyages to an end. No new law or ordinance was made after the risk commenced. No event occurred to impede the adventure except the declaration of war.

In my opinion the clause insuring these goods insures their safe arrival at Hamburg, and the destruction of that adventure was directly caused by His Majesty's declaration. It was therefore a loss within the clause which insures these goods at and from losses against restraint by kings, princes, or peoples.

In my opinion the order appealed from ought to be affirmed with costs.

LORD ATKINSON. My Lords, I concur.

The question in this case is novel and important. It is, I think, in effect this: Whether British merchants who have insured goods with British underwriters against the usual perils in a marine policy (including restraints of princes) upon a British ship for a voyage to the port of Hamburg can, upon war being declared by His Majesty the King of England, whereby the further prosecution of the insured voyage to that port becomes illegal, give notice to the underwriters of abandonment, and recover as for a constructive total loss of the goods by restraint of princes, though the goods themselves remain unharmed and in the actual possession of the assured.

The facts have been sufficiently stated by the noble and learned Lord who has preceded me. It is unnecessary to recapitulate them.

The respondents were insured against losses arising from "takings at sea, arrests, restraints, and detainments of all kings, princes, and people of what nation, condition, or quality soever."

The appellants contend that the law as to the constructive loss of goods on a voyage, as distinguished from the ship which carried them, is entirely altered by the Marine Insurance Act of 1906. And the ship and the cargo are, by that statute, impliedly placed upon the same level.

The first question I desire to deal with, then, is whether this contention is right, but to determine it one must first consider what was the state of the law on the subject before the passing of this statute, and then examine how far, if at all, the provisions of the

statute conflict with that law. It is only necessary to refer to three cases upon the point, namely, *Anderson* v. *Wallis* (1), *Barker* v. *Blakes* (2), and *Rodoconachi* v. *Elliott*. (3)

In *Barker* v. *Blakes* (2), decided in 1808, Lord Ellenborough laid it down that the impossibility of prosecuting the voyage to the place of destination, which arose during and in consequence of the prolonged detention of the ship and cargo, may properly be considered a loss of the voyage, and such a loss of voyage, upon received principles of insurance law, is a total loss of the goods which were to have been transported in the course of that voyage, provided the loss be followed by a sufficiently prompt and immediate notice of abandonment.

In *Anderson* v. *Wallis* (4) the same learned judge said: "I am well aware that an insurance upon a cargo for a particular voyage contemplates that the voyage shall be performed with that cargo, and any risk which renders the cargo permanently lost to the assured may be a cause of abandonment. In like manner a total loss of cargo may be effected not merely by the destruction of that cargo, but by a total permanent incapacity of the ship to perform the voyage. That is a destruction of the contemplated adventure. But the case of an interruption of the voyage does not warrant the assured in totally disengaging himself from the adventure, and throwing this burthen on the underwriters. It is unnecessary to pursue the subject farther, as there is not any case nor principle which authorises an abandonment, unless where the loss has been actually a total loss, or in the highest degree probable, at the time of abandonment."

In the third case Bramwell B., in delivering the judgment of the Exchequer Chamber, said (5): "It is well established that there may be a loss of the goods by a loss of the voyage in which the goods are being transported, if it amounts, to use the words of Lord Ellenborough, 'to a destruction of the contemplated adventure.'"

For this he cites the two cases above mentioned.

Mr. Roche has suggested that this loss of voyage means a loss of

(1) 2 M. & S. 240.
(2) 9 East, 283, 293–294.
(3) L. R. 9 C. P. 518.
(4) 2 M. & S. 247.
(5) L. R. 9 C. P. 522.

H. L. (E.) 1916

BRITISH AND FOREIGN MARINE INSURANCE COMPANY, LIMITED v. SAMUEL SANDAY & Co.

Lord Atkinson.

market for the goods. Not a loss of profit, but a loss of market. And that what the assured insures against is, not merely the loss sustained by injury to or destruction of the goods, but in addition the loss resulting from a failure to transport the goods to their destination, that failure being established by detention of them through one of the perils insured against, so prolonged as to amount to a destruction of the contemplated adventure. This may be so. It is a rational explanation. I think none other was given.

The next matter to consider is whether there is any provision to be found in the statute of 1906, either express or implied, inconsistent with the law as settled by the above-mentioned authorities.

First, the statute of 1906 purports to be an Act merely to codify the law relating to marine insurance. Sect. 91, sub-s. 2, provides that the rules of the common law, including the law merchant, save so far as they are inconsistent with the provisions of the Act, shall continue to apply to contracts of marine insurance. A comparison between sub-ss. 2 and 3 of s. 60 shows that, in the case of the insurance of goods, the cost of bringing the goods to their destination is to be taken into account in estimating whether or not a constructive total loss of them has occurred. Thus the old rule of law has been preserved—*Rosetto* v. *Gurney*. (1)

Constructive total loss is, subject to any express provision in the policy, defined to occur when the subject-matter insured is reasonably abandoned on account of actual loss appearing to be unavoidable, or because it could not be preserved from actual total loss without an expenditure which would exceed its value when the expenditure had been incurred.

By s. 57 it is provided that actual total loss occurs where the subject-matter insured is destroyed, or so damaged as to cease to be a thing of the kind insured, or where the assured is irretrievably deprived thereof. These provisions make it necessary to determine what is the subject-matter insured in these policies. There is no definition of the word "subject-matter." Sect. 26, sub-s. 1, provides that the subject-matter insured must be designated in a marine policy with reasonable certainty, and sub-s. 4 that in the application of this section regard shall be had to any usage regulating the

(1) (1851) 11 C. B. 176.

designation of the subject-matter. By the word "designation" is, I think, meant identification or description.

The subject-matter in the case of the *Orthia* is stated in the policy to be linseed valued at 11,000*l*. That, however, is only part of its description or designation or identification. Its full description, as shown by the policy itself, is, linseed valued at 11,000*l*., shipped on board this vessel to be transported on a voyage at or from a port on the River Plate to Hamburg. Such a description in such a policy connotes rights and characteristics attached by the insurance law to goods so placed, one of which is this, that they may be treated as constructively totally lost if, by one of the perils insured against as the proximate cause, the adventure of taking them to their destination be destroyed.

If that be so, as I think it is, then if the loss of the voyage, the loss of the chance of arriving at the port of destination, and the consequent loss of the market appear to be unavoidable, there would be a constructive total loss of the subject-matter. I am, therefore, of opinion that, in the insurance of goods, the law as it stood before the Act of 1906, in reference to the subject of constructive total loss, remains unchanged.

Two questions remain: First, were these vessels diverted from the contemplated voyage by "the restraint of kings or princes"? And, second, if they were, was this restraint in each case the proximate cause of the diversion within the meaning of s. 55?

It was contended that the declaration of war merely altered the status of the inhabitants of the German Empire, changing them from friends to enemies, and that it was the common law, acting on that condition of things, not anything done by the Sovereign, which prevented the voyages of the ships to their respective destinations, owing to the obligation felt by their masters, as good citizens, to obey the common law of the country; that the vessels were, therefore, not subjected to any restraint of kings or princes, and that, even if they were, that restraint was not the proximate cause of the loss of the voyage.

In the case of *Rodoconachi* v. *Elliott* (1) Bramwell B. said that the Court considered that these words, "restraints and detainments of all kings and princes, and people of what nation, condition, or

(1) L. R. 9 C. P. 518, 523.

H. L. (E.) 1916

BRITISH AND FOREIGN MARINE INSURANCE COMPANY, LIMITED v. SAMUEL SANDAY & CO.

Lord Atkinson.

quality soever," are wider and more comprehensive than the words which immediately precede them, i.e., the words "takings at sea, arrests"; that the word "restraint" as applied to goods must mean a restraint of those having the custody of the goods; that it was not necessary that there should be any specific action on the goods themselves, and that as the effect of the siege of Paris (at which city the goods had arrived) was to cut off all foreign connection and correspondence, the goods were restrained and prevented from leaving Paris by the operation of that siege, and therefore restrained and "detained by kings and princes" within the terms of the policy. It was accordingly held that the "contemplated venture" was destroyed, and that there was a constructive total loss of the goods.

In the present case the trading with Germany was lawful up to August 4, 1914. On that day by the act of the Sovereign it became unlawful. No executive, person, or body, no moral or physical agency, intervened between the act of the Sovereign, proclaimed in his declaration of war, and the abandonment of the intended voyage.

As soon as information was conveyed to the captain of the *St. Andrew* he sailed for Liverpool. On August 5 the owners of the *Orthia* telegraphed to her to St. Vincent to return. The common law which made it illegal to go to Hamburg was brought into immediate operation by the act of the Sovereign. By the warning he gave it must be taken that he meant to have that law enforced against those who neglected his warning.

I do not think, therefore, that the operation of the common law can be separated from the act of the Sovereign which called it into action and treated as an intervenement between that act and the abandonment of the voyage. The act of the Sovereign in declaring war and the calling of the common law into operation formed, I think, two parts of one act—one single exercise of the Royal prerogative.

This was the proximate cause of the diversion of the respective courses of the two ships and their ultimate abandonment of the original voyage.

The question remains, Did the exercise by the Sovereign of his Royal prerogative in this respect impose upon each of these ships a restraint of a King or Prince within the meaning of the policies?

By the 10th rule in the First Schedule to the Act it is provided that the term "arrests, &c., of kings, princes, and people" refers to political or executive acts, and does not include a loss caused by riot or ordinary judicial process.

Well, the act of the Sovereign in making war and by his Proclamation declaring it, and thus calling common law into operation, was clearly an executive act—an act of State done by virtue of the Royal prerogative. The declaration carries with it all the force of a law prohibiting intercourse with the enemy save with licence of the Sovereign. It had the executive forces of the Crown behind it to enforce obedience to it: *Esposito* v. *Bowden*. (1)

Every subject must be taken to be aware that if he attempts to send or bring a ship and cargo to an enemy port the ship can be prevented from entering that port by His Majesty's ships of war and he himself be liable to be prosecuted for trading, or attempting to trade, with the enemy. If the possible infliction of those penalties deters him from making the attempt, is he not restrained from making it? And if not, must the restraint be physical either of the persons in possession of the goods, or of the goods themselves, by the taking of the custody of them?

According to Bramwell J.'s judgment in *Rodoconachi* v. *Elliott* (2) this latter is not necessary. And *Miller* v. *Law Accident Insurance Co.* (3) is a direct authority that potential as distinguished from actual physical force is sufficient to constitute a "restraint."

The cases of *Hadkinson* v. *Robinson* (4) and *Lubbock* v. *Rowcroft* (5) are distinguishable from the present. In each of these cases the only deterrent was the risk of ultimate capture if the ships proceeded to their destination. The vessels prudently resolved not to incur that risk. In the present case the deterrents were the penalties incurred by the violation of the criminal law. This was present and immediate, if the ship proceeded at all towards her destination with a view of trading with the enemy.

Actual capture was in these cases the peril insured against. The apprehension of capture is an entirely different thing and was not insured against. Well, it is clear that the war is of

(1) 7 E. & B. 763, 781.
(2) L. R. 9 C. P. 518, 523.
(3) [1903] 1 K. B. 712.
(4) 3 Bos. & P. 388.
(5) 5 Esp. 50.

H. L. (E.) 1916

BRITISH AND FOREIGN MARINE INSURANCE COMPANY, LIMITED v. SAMUEL SANDAY & Co.

uncertain duration. Nobody could with any confidence conjecture when it would terminate. A long delay appeared most probable before the voyage could be resumed.

On the whole, therefore, I am of opinion that the judgment appealed from was right, and that this appeal should be dismissed with costs.

LORD SHAW OF DUNFERMLINE. (1) My Lords, so completely do I agree with the judgment of Bailhache J. that I desire respectfully to adopt in its entirety the opinion delivered by that learned judge. I think the law laid down by him so plainly sound, and his statements and reasoning so unanswerably cogent, that, seeing that I also approach and view the case from the same standpoint, I gladly feel free to indorse and adopt his judgment.

I think that the appeal should fail.

LORD PARMOOR. My Lords, two questions arise for decision in the present appeal. The first is whether there has been a constructive total loss of the subject-matter insured. The second, whether the loss (if incurred) is proximately due to restraints of kings, princes, and people, of what nation, condition, or quality soever, which is one of the perils insured against.

The facts are agreed. The respondents are a British firm of corn merchants. They contracted to sell to German merchants at Hamburg certain linseed and wheat, shipped in July, 1914, on board the British steamship *St. Andrew*, at the ports of Rosario, San Nicolas, and Buenos Aires, to be carried to Hamburg. In the same month they contracted to sell to German merchants certain linseed, shipped at Rosario on the British steamship *Orthia*, to be carried to Hamburg. For the purpose of this case there is no distinction between the two shipments.

By a policy of marine insurance dated July 31, 1914, the respondents insured the said linseed and wheat shipped on the *St. Andrew* at and from port or ports of the River Plate and/or tributaries to Hamburg. On August 4, 1914, a declaration was made that a state of war existed between this country and Germany. The effect of the outbreak of war was to interdict, and render illegal,

(1) Read by Lord Wrenbury.

all trading with the enemy without the permission of the Sovereign. On August 5 a Proclamation was issued warning all persons not to permit any British ship to leave for, enter, or communicate with any port or place in the German Empire without the permission of the Sovereign, and that any person acting in contravention of the Proclamation would be liable to such penalties as the law allows. The penalty for trading with the enemy after the declaration of August 4 and the Proclamation of August 5 would include the imprisonment of the master and the confiscation of goods and ship. On August 9, as the *St. Andrew* was approaching the Lizard, a French cruiser signalled her to stop and to go to Falmouth. The master at Falmouth received orders through the examining officer at Falmouth, from the Chief Naval Transport Officer at Devonport, to go to Liverpool, and upon arrival the linseed and wheat were duly discharged.

The policy, on which the claim is made, is in the common form of a Lloyd's policy, and the frustration of the contemplated adventure would constitute a total constructive loss of the goods insured in transit, unless an alteration of law has been introduced by the Marine Insurance Act, 1906. A notice of abandonment of the goods insured was made on September 7, 1914, and the appellants do not raise any question that the notice was not valid or out of time.

On the first question I think that the Act of 1906 has not introduced any alteration in the law, and that there has been a constructive total loss of the goods insured. The Act of 1906 is an Act to codify the law relating to marine insurance. There is, however, no difference in the canons of construction applicable to a codifying Act or to any other Act of Parliament. It is said that in certain respects the Act of 1906 has altered the law. I give no opinion upon this point, and it has no relevance whatever to the question before your Lordships in this appeal.

By s. 60, sub-s. 1, a constructive total loss is defined: "Subject to any express provision in the policy, there is a constructive total loss where the subject-matter insured is reasonably abandoned on account of its actual loss appearing to be unavoidable, or because it could not be preserved from actual total loss without an expenditure which would exceed its value when the expenditure had been incurred." If the subject-matter insured in the present case includes

H. L. (E.) 1916

BRITISH AND FOREIGN MARINE INSURANCE COMPANY, LIMITED v. SAMUEL SANDAY & Co.

Lord Parmoor.

the contemplated adventure, it was no doubt reasonably abandoned on account of its actual loss appearing to be unavoidable, and a case of constructive total loss arises. Sect. 26 deals with subject-matter and s. 26, sub-s. 4, enacts that "In the application of this section regard shall be had to any usage regulating the designation of the subject-matter insured."

When the Act was passed the common form Lloyd policy of marine insurance on goods in transit from one port to another designated by usage that the contemplated adventure was part of the subject-matter, so that if the contemplated adventure was frustrated by a peril insured against, the insurers became liable to pay the insured the amount due under the policy. This position is not altered but preserved by sub-s. 4. The usage of the law merchant that a policy in the present form did designate that the subject-matter included the contemplated adventure is applicable now in the same way as it was before the Act was passed.

In addition to the sections above referred to, reference may be made to s. 91, sub-s. 2, which provides that the rules of the common law, including the law of merchants, saving so far as they are inconsistent with the express provisions of the Act, shall continue to apply to contracts of marine insurance.

If there has been a constructive total loss, the second question arises whether the restraint of "kings, princes," &c., was the proximate cause of such loss. The Marine Insurance Act, 1906, contains in the schedule "Rules for Construction of Policy," which apply, subject to the provisions of the Act, and where the context does not otherwise require. These rules are said to record the interpretation which by law or usage has been placed on some of the more important terms in a common Lloyd policy. Rule 10 states that the term "arrests, &c., of kings, princes, and people" refers to political or executive acts, and does not include a loss caused by riot or by ordinary judicial process. It could not be suggested in the present case that the loss was caused by ordinary judicial process, and there is no question of riot.

The case of *Finlay* v. *Liverpool and Great Western Steamship Co.* (1) sufficiently illustrates what is meant by the words "ordinary judicial process." It was adjudged a bad plea by way of answer

(1) 23 L. T. 251.

to a claim for not delivering goods in accordance with the bill of lading that the defendants were prevented by acts or restraints of princes "that they had been sued in New York by the true owner of the goods and had been ordered by a Court of competent jurisdiction to give up the goods to him."

It was argued that "restraint," coming in a context between the words "arrest" and "detainment," implied that this term in the policy did not attach and render the insurers liable unless force was either used or threatened. A similar argument was urged in the case of *Miller* v. *Law Accident Insurance Co.* (1) In that case, in consequence of a decree of the President stopping the discharge of all cattle from the United Kingdom until further notice, the captain took the vessel outside the port and transhipped the cattle. It was held in the Court of Appeal that there had been a restraint of princes, and Stirling L.J. says: "It seems to me that there was an active intervention of the Government of the Argentine Republic, which was none the less an exercise of superior force because no officer of the army or of the police force intervened."

My Lords, I agree in the opinion expressed by Stirling L.J. If the restraint in the present case has been imposed by political or executive acts, it is not the less a restraint, within the terms of the policy, because the master submits without opposition and without the presence of either actual or threatened force. I cannot doubt that the declaration of war on August 4, 1914, and the Proclamation "relating to trading with the enemy" on August 5, 1914, are in the ordinary sense acts of the Executive, or, in the words of the rule, executive acts. The declaration of war by the Sovereign has equal force to an Act of Parliament prohibiting intercourse with the enemy except with the King's licence: *Esposito* v. *Bowden.* (2) The Proclamation of August 5 stands on the same footing and has the same authority. It follows that all the conditions necessary to establish a restraint of kings, princes, &c., are operative in the present case; but the question has still to be determined whether the restraint was the proximate or immediate cause of the frustration of the contemplated adventure, and of the consequent constructive total loss.

After the declaration of war, and in accordance with the terms of

(1) [1903] 1 K. B. 712, 720. (2) 7 E. & B. 763, 781.

H. L. (E.) 1916

BRITISH AND FOREIGN MARINE INSURANCE COMPANY, LIMITED v. SAMUEL SANDAY & CO.

Lord Parmoor.

the subsequent Proclamation, all trading of British ships with the enemy was interdicted, and it became illegal to prosecute the voyage to Hamburg unless with the permission of the Sovereign. When, therefore, the French cruiser signalled the *St. Andrew* to go to Falmouth, the master could not have proceeded to Hamburg without rendering himself liable to all the consequent penalties. On receiving the signal the master submitted to the restraint which the conditions had imposed upon him, and took his vessel to a home port. He did not deviate from his course in order to avoid a future peril to which he might become liable, but because the peril was actually present and operative at the time when he turned his vessel from Hamburg to the home port.

I agree in the reasoning and conclusion of Bailhache J. (1): " When once it is admitted that force is not necessary to constitute restraint of princes it is clear that a shipowner who keeps his vessel at home or diverts her to a home port in obedience to such a proclamation is not taking steps to avoid that particular peril, but is submitting to its operation," and that " in such a case restraint of princes is the proximate cause of loss." I have not overlooked the case of *Hadkinson* v. *Robinson* (2) and similar cases, but they appear to me to have no application. There is a clear distinction between a deviation to avoid a peril and a deviation due to its presence and immediate operation.

My Lords, in my opinion the decision on appeal is right, and the appeal should be dismissed with costs.

Lord Wrenbury. My Lords, there arise here two questions for decision. The first is whether His Majesty's declaration of war against Germany operated as a restraint falling within the words in the policy " restraints of all kings, princes, and people." The second is whether the consequent detention for an indefinite time of the goods insured amounted to a constructive total loss. The two questions are wholly distinct, and each is, no doubt, of great importance.

On August 4, 1914, His Majesty declared war against Germany. The insured goods were then at sea on voyages, the one from the River Plate, and the other from Rosario, to be delivered at Hamburg.

(1) [1915] 2 K. B. 781, 789. (2) 3 Bos. & P. 388.

The one vessel, being off the Lizard, was signalled by a French cruiser to put into Falmouth, and obeyed. The other vessel, on calling at St. Vincent, was directed by her owners, at the suggestion of the Admiralty, to go to Glasgow, and did so. The order in each case was due to the existence of a state of war. The owners gave notice of abandonment. Was there "restraint of kings, princes, and people" within the meaning of the policy? In my opinion there was.

A declaration of war by the Sovereign is a political or executive act, done by virtue of his prerogative, which creates a state of war. A state of war is a lawful state, and is one in which every subject of His Majesty becomes an enemy of the nation against which war is declared. The declaration of war amounts to an order to every subject of the Crown to conduct himself in such way as he is bound to conduct himself in a state of war. It is an order to every militant subject to fight as he shall be directed, and an order to every civilian subject to cease to trade with the enemy. There is "a general rule in the maritime jurisprudence of this country by which all subjects trading with the public enemy, unless with the permission of the Sovereign, is interdicted": *The Hoop.* (1) "A declaration of war imports a prohibition of commercial intercourse and correspondence with the inhabitants of the enemy's country, and that such intercourse, except with the licence of the Crown, is illegal": *Esposito* v. *Bowden.* (2) We have heard considerable argument to the effect that war is not unilateral—which, no doubt, is true—that you must have at least two nations engaged in hostilities, and so on. All this to my mind is beside the mark. Immediately the Royal prerogative is exercised and war is declared against another nation every subject of His Majesty is bound to regard every subject of that nation as an enemy, and the consequences ensue which I have mentioned.

If I ask myself what stopped the voyage to Hamburg? What made the venture illegal? What destroyed the venture? The answer is—the declaration of war. That executive act ipso facto made the venture illegal. If the master had continued his voyage in defiance of the law the ship and goods could have been confiscated, and the master himself prosecuted and sent to prison. It is

(1) 1 C. Rob. 196, 198. (2) 7 E. & B. 779.

H. L. (E.) 1916

BRITISH AND FOREIGN MARINE INSURANCE COMPANY, LIMITED v. SAMUEL SANDAY & Co.

Lord Wrenbury.

argued that the illegality, and not the declaration of war, was the causa proxima of the destruction of the adventure. This is not so. The common law was not a new actor which came into action when war was declared. The law was always one and the same, namely, that in one state of circumstances (namely, peace) the adventure was and in another state of circumstances (namely, war) the adventure was not legal. *Hadkinson* v. *Robinson* (1) and *Kacianoff* v. *China Traders Insurance Co.* (2) are not in point. The adventure there remained legal. All that happened was that, in pursuit of a lawful adventure, the master did not go into a position of peril. He never was restrained. His own country did not restrain him, and he took care not to put himself in danger of being restrained by another country. Illegality according to the law of another country does not affect the merchant. In the present case the adventure was illegal according to the law of the country of the owner of the goods. And it was the declaration of war that made it illegal.

It is not necessary that force should be employed, or even that force should be immediately available for employment. Every State ultimately enforces obedience to its laws by force. Restraint is equally imposed when obedience is given by reason of the existence of force in reserve as when it is given by reason of force employed. Neither is it necessary that there should be any specific action upon the goods themselves. The master was restrained, and the venture was restrained, by the fact that illegality supervened as the immediate result of the declaration of war. In my opinion there was in this case restraint falling within the words " restraint of kings, princes, and people."

Upon the second question the matter stands thus: Before the Marine Insurance Act, 1906, authority is uniform that where goods are insured at or from one port to another port the insurance is not confined to an indemnity to be paid in case the goods are injured or destroyed, but extends to an indemnity to be paid in case the goods do not reach their destination. This may be variously described as an insurance of the venture, or an insurance of the voyage, or an insurance of the market, as distinguished from an insurance of the goods simply and solely. Goods delivered at the port of destination may be of value very different from

(1) 3 Bos. & P. 388. (2) [1913] 3 K. B. 407; [1914] 3 K. B. 1121.

their value at the port of loading. The underwriter's obligation is to pay money in the event of the goods failing to arrive at their destination uninjured by any of the perils insured against. Bramwell B. in *Rodoconachi* v. *Elliott* (1) says: "It is well established that there may be a loss of the goods by a loss of the voyage in which the goods are being transported, if it amounts, in the words of Lord Ellenborough, 'to a destruction of the contemplated adventure.'" The insurance is on the venture, and the loss of the venture is a constructive total loss of the goods.

I cannot find that the Act of 1906 has in any way altered this. On the contrary, it seems to me to have preserved it. The Act is expressed by its title to be an Act to codify the law relating to Marine Insurance. Attention has been called to certain particulars in which nevertheless the Act alters the law. That is true. But it remains that the Act is a codifying Act. That being so, I should look more carefully in a codifying Act to see whether any existing law is altered by express words, and should not hold that the Act is going beyond codification unless it puts the matter beyond dispute.

I can find nothing which upon this matter has any such effect. On the contrary, ss. 5, 26, 60, and 91 seem to me plain the other way. Sect. 5, sub-s. 2, contemplates that an assured "may benefit by the safety or due arrival of insurable property." Sect. 26, which relates to subject-matter, enacts (sub-s. 1) that the subject-matter insured must be designated with reasonable certainty. "Designated" must here plainly mean described or identified. Sub-s. 4 then enacts that "in the application of this section regard shall be had to any usage regulating the designation of the subject-matter insured." By "usage regulating the designation" must be meant a customary nomenclature of identification. Such, for instance, as that in the trade of a livery stable keeper the word "carriage" by usage means "carriage and horses." If, then, in marine insurance a policy on goods means by usage a policy on the safe arrival of goods, that meaning is by s. 26 preserved. Sect. 60 is as to constructive total loss, and sub-s. 2 (iii.) provides that in the case of damage to goods there is a constructive total loss when the cost of repairing the damage *and forwarding the goods to their destination* would exceed their value on arrival. Lastly, s. 91,

(1) L. R. 9 C. P. 518, 522.

H. L. (E.) 1916

BRITISH AND FOREIGN MARINE INSURANCE COMPANY, LIMITED v. SAMUEL SANDAY & CO.

Lord Wrenbury.

sub-s. 2, enacts that the rules of the common law, including the law merchant, save in so far as they are inconsistent with the express provisions of this Act, shall continue to apply to contracts of marine insurance.

My Lords, these provisions seem to me ample to support the conclusion at which I have arrived, that the Act of 1906 has not altered but has preserved the law upon this point as it stood before 1906, and that law was that under a policy on goods at and from a port to a port the venture, and not the goods merely, was the subject-matter insured.

For the foregoing reasons the decision under appeal is, in my judgment, right on both points. It follows that this appeal should, in my opinion, be dismissed with costs.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, January 27, 1916.

Solicitors for appellants: *Waltons & Co.*

Solicitors for respondents: *Pritchard & Sons, for Andrew M. Jackson & Co., Hull.*

[HOUSE OF LORDS.]

BOARD OF AGRICULTURE FOR SCOTLAND Appellants ; AND PLUMMER . . . . . Respondent.

H. L. (Sc.)* 1916 *Jan.* 18.

Small Holdings—Compensation to Landlord—Diminution of Selling Value of Estate owing to Presence of Small Holdings—Small Landholders (Scotland) Act, 1911 (1 & 2 *Geo.* 5, *c.* 49), *s.* 7, *sub-s.* 11.

The Small Landholders (Scotland) Act, 1911, s. 7, sub-s. 11, provides that when small holdings are compulsorily constituted on an estate compensation shall be paid by the Board of Agriculture for Scotland, where the Scottish Land Court, or in cases where the question of compensation is referred to arbitration the arbiter, is of opinion (inter alia) that damage or injury will be done to any landlord "in respect of any depreciation in the value of the estate" of which the land to be occupied by the new holders forms part in consequence of and directly attributable to the constitution of the new holdings as proposed :—

Held, that it was competent to an arbiter under this provision to include under the head of depreciation in the value of the estate depreciation in the selling value directly attributable to the presence of small holdings.

Decision of the Second Division of the Court of Session in Scotland, 1915 S. C. 1048, affirmed.

Appeal from an interlocutor of the Second Division of the Court of Session in Scotland (1) recalling an interlocutor of the Lord Ordinary.

The respondent was the proprietor of an estate in the county of Selkirk called the Sunderland Hall Estate, extending to about 3000 acres. The estate included a farm called Lindean Farm, which was situated in the centre of the estate and extended to about 900 acres. In January, 1913, the appellants, the Board of Agriculture for Scotland, applied to the Land Court under the Small Landholders (Scotland) Act, 1911, for the constitution of new holdings on Lindean Farm. The application was opposed by the respondent, but was ultimately, subject to certain exceptions, granted by the Land

* *Present :* Viscount Haldane, Lord Kinnear, Lord Shaw of Dunfermline, Lord Parmoor, and Lord Wrenbury

(1) 1915 S. C. 1048.

H. L. (Sc.) 1916 BOARD OF AGRICULTURE FOR SCOTLAND v. PLUMMER.

Court, and twelve new holdings were duly constituted on the farm. Thereupon the respondent intimated to the appellants that he claimed compensation under s. 7, sub-s. 11, of the Act (1) to an amount exceeding 300*l.* in respect of the formation of the new holdings and that he desired to have the matter settled by arbitration, and in December, 1913, he presented a petition to the Lord Ordinary officiating on the Bills for the nomination of an arbiter, and Mr. J. I. Davidson was appointed. The arbiter pronounced a final award in which he awarded compensation to the respondent under five heads amounting in the whole to 8588*l.* odd.

The fifth head was as follows: "In respect of loss caused by depreciation in the value of the estate in consequence of, and directly attributable to, the constitution of new holdings 4600*l.* 0*s.* 0*d.*" The arbiter explained in the award that in arriving at this figure he had in view the following sub-heads of damage and injury,

(1) Small Landholders (Scotland) Act, 1911, s. 7, sub-s. 11: ". . . . Provided that, where the Land Court are of opinion that damage or injury will be done to the letting value of the land to be occupied by a new holder or new holders, or of any farm of which such land forms part, or to any tenant in respect that the land forms part or the whole of his tenancy, or to any landlord either in respect of an obligation to take over sheep stock at a valuation or in respect of any depreciation in the value of the estate of which the land forms part in consequence of and directly attributable to the constitution of the new holding or holdings as proposed, they shall require the Board, in the event of the scheme being proceeded with, to pay compensation to such amount as the Land Court determine after giving parties an opportunity of being heard and, if they so desire, of leading evidence in the matter: Provided always that where within twenty-one days after the receipt from the Land Court of an order under this subsection a landlord or a tenant, as the case may be, intimates to the Land Court and to the Board that he claims compensation to an amount exceeding three hundred pounds and that he desires to have the question whether damage or injury entitling him to compensation as aforesaid will be done, together with the amount of such compensation (if any), to be settled by arbitration instead of by the Land Court, the same shall be settled accordingly." (The subsection then contains provisions for the appointment of an arbiter "whose award shall be final, and binding on the Board, in the event of the scheme being proceeded with," and it concludes as follows:)

"In determining the amount of compensation under any provision of this Act, no additional allowance shall be made on account of the constitution or enlargement of any holding being compulsory."

namely: (*a*) depreciation on the capital and saleable value of the estate; (*b*) depreciation in the value of the shootings of the farm; (*c*) additional expense of management of the estate; (*d*) severance; and that according to his construction of the statute each and all of these sub-heads were competent and valid claims thereunder; but in case it should be held in any future proceeding that sub-head (*a*) was not a competent and valid claim he assessed separately the compensation due under sub-heads (*b*), (*c*), and (*d*) at 750*l*. The appellants paid to the respondent the 750*l*., but they declined to pay the balance of 3850*l*. on the ground that the claim in respect of which that sum was awarded was not a competent claim under the statute and that the award in respect thereof was ultra vires. The respondent accordingly brought an action against the appellants for payment of the balance of 3850*l*.

The Lord Ordinary (Lord Hunter) was of opinion that the award was ultra vires and assoilzied the appellants from the conclusions of the summons, but the Second Division (the Lord Justice-Clerk, Lord Dundas, and Lord Johnston) recalled the interlocutor of the Lord Ordinary and granted decree in favour of the respondent.

T. B. Morison, S.-G. for Scotland, and *T. Graham Robertson* (of the Scottish Bar), for the appellants. The arbitrator was not warranted by s. 7, sub-s. 11, of the Small Landholders Act in awarding compensation in respect of contingent depreciation in the saleable value of the estate. This particular head of depreciation depends not upon the order of the Land Court but upon the operation of the statutory tenure. It is not directly attributable to the constitution of the new holdings as proposed, but is attributable to the prejudice in the minds of possible purchasers. The clause in the statute refers to a number of items, including loss of letting value. That impliedly excludes selling value as a separate item. The effect of including in the last item, "depreciation in the value of the estate," depreciation in selling value is to make it swallow up all the previously enumerated items and to compensate the landowner twice over. "Depreciation in the value of the estate" means depreciation in the physical thing as a heritable subject in the possession of the landowner. It refers to actual realized loss due to the equipment and the setting up of the tenants in the

H. L. (Sc.) 1916

BOARD OF AGRICULTURE FOR SCOTLAND v. PLUMMER.

new holdings, e.g., damage resulting from the construction of new roads for the purposes of the holdings, as distinguished from contingent or potential loss. The theory of the Legislature is that the new scheme does not take away the owner's control, but merely regulates his control, leaving the ownership undisturbed. Depreciation in the selling value of the estate is not within the contemplation of the statute.

A. H. B. Constable, K.C., and *J. A. Christie* (both of the Scottish Bar), for the respondent, were not called upon.

VISCOUNT HALDANE. My Lords, the question which arises in this appeal is obviously one of great public importance. But, except for that importance, I find it difficult to think it is one deserving of the consideration which has been bestowed upon it in the Court below, or of giving rise to the difference of judicial opinion which has occurred.

My Lords, the question is one of the construction of an Act of Parliament, and the point is in reality not a difficult one. The Small Landholders (Scotland) Act has set up a new system in Scotland under which small holdings of various kinds are encouraged and provided for over the whole of Scotland. The machinery of the Crofters Act is largely made applicable to the remainder of Scotland, and special provision is made for setting up the small holdings to which I have referred. These small holdings may be constituted in more ways than one. They may be constituted by an agreement negotiated with the owner of the land on which it is proposed to establish them, and, if so, the landowner of course takes care to get in his price what would compensate him for loss arising from any depreciation of his estate consequent upon the establishment on it of the small holdings. But if an agreement is not come to, and the case is one in which the Board of Agriculture thinks it right that there should be small holdings upon that property, then the procedure which the statute prescribes comes into operation. That procedure includes compulsory purchase under provisions which are contained in the statute, and in the machinery is included the provision as to compensation to which I will presently make reference.

My Lords, I desire to say at the outset, in order to clear the ground of a certain amount of argument which I think is based upon

misapprehension, that it is quite well established in the jurisprudence of this country that if Parliament declares something to be lawful, be it a railway or be it a system of small holdings, and enables people to make that railway or that system by the exercise of compulsory powers, then no compensation can be claimed in the absence of an express provision to the contrary by the Legislature, and that follows from this: that what the Legislature has declared to be right cannot be considered wrong in a Court of justice, and no man can say, in the face of the supreme power of the Legislature where exercised against him, that he has any rights left. Just for that reason the Legislature has been in the practice of inserting compensation clauses in statutes which relate to compulsory purchase, and while it is quite true that it may be the fact that property is apt to be depreciated in the public mind by reason of a system of compulsory purchase being introduced, it is equally true that you usually find in such statutes provisions for compensation.

My Lords, in the present case the arbitrator gave his award and he awarded a certain sum of money upon the footing that it was compensation for depreciation in the value of the Lindean estate in consequence of and directly attributable to the constitution of the new holdings. He made his award in an alternative form, isolating certain minor items on which he awarded separately, and leaving the larger question whether he was entitled to make an award in respect of the item to which I have just referred, on the footing that the statute conferred authority on him in that behalf.

When I turn to the statute I find that the provision under which the arbitrator acted is one which is very simply expressed. It is contained in s. 7, sub-s. 11, and, reading it shortly, it amounts to this: Provided that where the Land Court are of opinion—in this case where the arbitrator is of opinion—that damage or injury will be done to any landlord in respect of any depreciation in the value of the estate of which the land forms part in consequence of and directly attributable to the constitution of the new holding or holdings as proposed, they shall require the Board to pay compensation. Now, my Lords, in the present case the arbitrator has found plainly enough, when you read his award, that, owing to the way in which the Board of Agriculture have selected the parts of the Lindean

H. L. (Sc.) 1916

BOARD OF AGRICULTURE FOR SCOTLAND v. PLUMMER.

Viscount Haldane.

estate on which they propose to establish small holdings, depreciation has been caused in the selling value of that estate. From the map which we have had before us it is plain that such depreciation might well result in the mind of somebody who was desirous of purchasing with considerations of amenity in the main in his mind, and who was therefore likely to be deterred by the introduction of a series of small holdings between the different parts of the estate. It may be true that the rental value is not affected; on the contrary, it seems to be likely to be somewhat increased by what will be got from the small holdings; but the amount of the rent receivable in one year is one thing, and the number of years' purchase which the owner can secure if he is minded to sell is quite another thing. In the present case the arbitrator, who is the person to whom the statute delegates, and delegates exclusively, the duty of judging, has found that within the meaning of the words of the statute there has been depreciation in the possible selling value of the property due to the constitution of these particular small holdings in this particular place. As I have said, I have examined his award and have come to the conclusion that that is plainly what he meant and what he has done. Now, that being so, it seems to me impossible to say that the arbitrator was acting outside his jurisdiction. Of course it is true that if the statute did not entitle him to say this he could not say it, and the mere fact that his award is intended to be final does not give him jurisdiction to do what is outside the duty which the Act of Parliament has cast upon him. He cannot go beyond the terms of the statute. He seems to me, in coming to the conclusion which he has and in making the award he has, to have been acting exactly within that provision in sub-s. 11 of s. 7 which is introduced to meet the case to which I have referred, of there being no right to obtain compensation unless the statute has made an express provision for it. The Legislature has thought fit to introduce compensation provisions here, just as it has done in the Lands Clauses Act and other statutes with which your Lordships are familiar. That being so, the arbitrator has awarded this compensation. It is said that that compensation is really due to the prejudice caused in the public mind by the introduction of the new system, a prejudice which in course of time will pass away. My Lords, the arbitrator has

found that that prejudice is due to the constitution of these particular small holdings, presumably in the place and under the circumstances in which they have been constituted. That is his finding. It is true he has also said that the landlord has no present intention of selling; but what of that? According to the principles which are so well settled in this House and in other Courts, when you make a claim of this kind under a section of this kind you must make your claim once for all. If hereafter new damage emerges from the same cause, and for which you therefore might have claimed, you cannot claim it again; and the arbitrator was therefore bound to take into account what has been called the potential diminution in the selling value, but what is really something that affects the value of the estate both for the purposes of sale and for the purposes of security. Therefore, my Lords, once you come to the conclusion that the arbitrator has done what he has done, and that he has taken into account facts, and not merely the effect upon the public mind of the circumstance that the Legislature has passed the Act in question, it seems to me that the conclusion is one which is free from reproach. It is not the system but the particular constitution of these small holdings that is the causa causans, to use the expression that has been used at the Bar. It is not a case of potential loss, but a case of actual loss.

My Lords, that is really sufficient to dispose of the appeal. It has been argued that the words introduced later on in s. 7, saying that nothing is to be given for loss on the ground of the purchase being compulsory, prevent us from recognizing this claim as a claim which is admissible under the section. But it is obvious that these words have been introduced for a very different purpose, namely, for preventing the practice growing up under this Act which has grown up under the Lands Clauses Act, of giving an extra allowance or an extra percentage merely because compulsion has been resorted to.

My Lords, for these reasons I am of opinion that the judgment of the Court below was right, and I move your Lordships that this appeal be dismissed, and dismissed with costs.

LORD KINNEAR. My Lords, I entirely agree with my noble and learned friend on the woolsack, and I do not think it necessary to trouble your Lordships by repeating what he has said. I shall

H. L. (Sc.) 1916

BOARD OF AGRICULTURE FOR SCOTLAND v. PLUMMER.

only say that I should, for myself, have thought the case an exceedingly simple one from the outset, except for my great respect for the judgment of the learned Lord Ordinary, but I am quite unable to follow his opinion for the reasons explained.

LORD SHAW OF DUNFERMLINE. My Lords, my only doubt in this case arises from the cause alluded to by my noble friend opposite, namely, on account of the judgment pronounced by Lord Hunter. Any judgment from that learned judge deserves and demands very respectful scrutiny by this House.

My Lords, so far, and so far only, do I agree with the argument presented by the appellants that I think it would be quite correct to state that there could be no compensation awarded by a Court of law in respect merely of the state of the law. I think that proposition can be broadly affirmed, and the only line of attack on this judgment lay in that direction.

But, my Lords, having listened to the arguments by the appellants' counsel, I am not at all satisfied that that is the true situation of matters here. The state of the law being accepted as correct by the Courts, and forming no basis of compensation, the law itself, by the mouthpiece of this statute, has directed what a Court or arbiter has to do in regard to the elements of compensation. The entire question before your Lordships' House has reference to the construction of a few words in sub-s. 11 of s. 7 of the Small Landholders (Scotland) Act, 1911. Before I read the specific words referred to, I may say that the entire transaction of the forming of new holdings is clogged with a proviso which refers in terms to three different matters. In the first place compensation is to be awarded in respect of damage or injury arising to the letting value of the actual land which is the subject of the statutory operation; in the second place, in consequence of that land being severed from a farm of which it formed a part; and this severance damage is accordingly made a second ground of compensation. Then, in addition to that, there is the third ground, which is very broad, and in my opinion very clear. It is: "in respect of any depreciation in the value of the estate"—that means the value of the estate as a whole upon which the operation of carving out new holdings is performed—"of which the land forms part in consequence of and directly

attributable to the constitution of the new holding or holdings as proposed." My Lords, the learned Lord Ordinary traverses the application of that section by the following observation. He says (1): "The award given of which complaint is made appears to me to be not in respect of direct, but of indirect, remote, and hypothetical loss." "It does not arise," says the learned judge, "from depreciation in the value of the estate, directly attributable to the constitution of the small holdings, but to objections which purchasers of the estate might personally have to the powers conferred by statute upon small holders." My Lords, I gather that the Lord Ordinary does really mean not objections which would be had to the powers conferred by the statute in general, but objections which contemplating purchasers of the particular estate would have to the constitution of new holdings by reason of the powers conferred by the statute being put in operation upon that particular estate. In another passage of his judgment he refers to these as "sentimental objections which offerers for the estate might have to the presence of statutory small holders." In my humble judgment an arbiter has nothing to do with the quality of the objections which either depress or raise market values. The one equally with the other he does not inspect the quality of: he assesses their pecuniary result. Your Lordships are well aware that it is one of the duties of an arbiter to assess all things which appraise or depress value, including the modes and fashions of the time or the ideas of persons appearing in the market who may be able to purchase. These sentimental objections matter nothing one way or another except as they affect the price to be realized. It is the same with regard to this estate in that particular as with regard to any other. The arbiter had to take into account not the state of the law in general, but the fact that part of the Executive had handled that estate and set in motion the law which introduced the compensation process.

My Lords, there are many advantages and disadvantages to be considered by the arbiter. The advantages were, inter alia, that many purchasers might have considered that by an estate having small holders upon it there would be large expense saved; there would be no chaffering as to rent in future; there would be no

(1) 1915 S. C. 1053.

H. L. (Sc.) 1916

BOARD OF AGRICULTURE FOR SCOTLAND v. PLUMMER.

Lord Shaw of Dunfermline.

arrears of rent in all probability in all time to come; there would be no expense of claims for improvements in all time to come; and consequently there would be a reduction in estate management. All those things might be figured on the side of the advantages. On the side of the disadvantages was the fact that there was less power of control on the part of the landlord, and the fact that, whatever the award was, his views with regard to his general management as landlord in that part of the estate might be seriously affected. To these latter the present arbiter appears to have attached importance. All these things were taken into account, and properly so, by the arbiter, as bearing upon the one fact he had to determine, namely, the value of the estate. He has compared advantages with disadvantages, but these latter did in the view which he adopted so preponderate as to enable him to pronounce—and no one questions his honesty—this very large award. Had it been established that the arbiter had given compensation for what was in any particular not directly attributable to the constitution of these new holdings, but to what was either remote or indirect or consequential, then the entire result of this case would have been different.

In these circumstances, my Lords, I venture to express my entire agreement with Lord Johnston in the observation that the state and time which apply to this award is the state of matters existing at the date of the award. Views as to these advantages or disadvantages or their preponderance in future may change as the operation of the Act proceeds, but what the arbiter had to do was to consider the state of matters when he pronounced his award. And I hold it to be quite fantastic to object to this award on the ground that it was hypothetical. It was only hypothetical in the sense that not only present but all prospective elements of value must be now finally considered when the arbiter makes his award.

I apologize to your Lordships for even stating these facts, but it was out of respect for the Lord Ordinary and because of the importance of the case that I thought it right to give separate expression to my views.

LORD PARMOOR. My Lords, the question raised in this appeal appears to me at least to be a simple one, if we apply to it the

ordinary principles which ought to be applied in the construction of statutes which give compensation.

There are two points on which I entirely agree with the argument of the learned Solicitor-General for Scotland. In the first place it is quite clear that an arbiter cannot give compensation in respect of matters not comprised within the statutory powers of the Act which confers jurisdiction upon him. No arbiter can ever finally decide for himself the question of jurisdiction. In the second place all compensation statutes are based on the principle that there is no compensation unless it is expressly given in the terms of the statute itself. Statutes of this character make acts legal which otherwise would be illegal, and, as is familiar to every one, under the Lands Clauses Consolidation Act it has been held several times that compensation is an alternative to the right of action, but if no compensation is given, as in the case of *Hammersmith Ry. Co.* v. *Brand* (1) and cases of that character, you cannot say that what has been sanctioned by the statute is illegal, and therefore there is neither compensation nor any other remedy.

My Lords, in this particular case the relevant section is s. 7, sub-s. 11, and the particular words which I desire to quote are very few. Compensation is given " in respect of any depreciation in the value of the estate of which the land forms part in consequence of and directly attributable to the constitution of the new holding or holdings as proposed." There is no compensation here given in respect of severance, which is the subject-matter of compensation under the Lands Clauses Act, but it is given " in consequence of and directly attributable to the constitution of the new holding or holdings as proposed." My Lords, in my view " constitution " means the constitution in fact in a particular case. That is a consideration which the arbiter may and should take into account in assessing the amount of compensation. Secondly, as regards the words " the new holding or holdings as proposed," in my view the words " as proposed " are not against the award which the arbiter has made, but in favour of it. This construction is made clear by the words " as proposed," words applicable to the question of site, as well as to other considerations when the new holding or holdings are constituted on a particular estate.

(1) (1869) L. R. 4 H. L. 171.

H. L. (Sc.)
1916
BOARD OF AGRICULTURE FOR SCOTLAND v. PLUMMER.
Lord Parmoor.

As I understand the argument of the Solicitor-General, it comes to this: that there is some special meaning to be attached to the words in this section, which excludes what is an ordinary principle in the assessment of depreciation in the value of an estate, namely, a depreciation in its selling value. In any ordinary method of assessment depreciation in the selling value would be a test of depreciation in the value of the estate, and the Solicitor-General has had to argue that, for reasons which I cannot follow, an ordinary method of assessment has been excluded by the operation of the words which we find in this particular statute. He relies on, I understand, various reasons, but I think they may all be comprised under two heads. In the first place, he says that it is compensation for tenure which has been given, and that no compensation for tenure is given under the words of the statute. My Lords, I think that that is a misunderstanding, both of what the arbiter has awarded and of the words of the statute. What the arbiter has awarded is not compensation in respect of tenure, but compensation in respect of the user of land which that tenure allows; in other words, compensation in respect of user of land in accordance with the statutory power which this section and the rest of the Act has given. Now, applying the ordinary principles of compensation, it is exactly in respect of a user of land which the statute has rendered legal that compensation is ordinarily given, if such user does in fact cause damage, or, to use the words of this statute, does cause depreciation in the value of the estate. It would appear to me to be entirely impossible to exclude the notion of the user which this new tenure allows. It is the very factor which has been introduced under the statute, and it is the very factor which, in accordance with ordinary compensation principles, would be the basis in reference to which the amount of depreciation ought to be assessed.

The other point is as regards potential value. My Lords, it is quite clear that where compensation has to be assessed once for all—and that is the principle of all compensation claims if the damage or injury can be foreseen—the arbiter may have to ascertain what is called the potential value. I should like to associate myself with what was said by Lord Kinnear in the course of the argument: You might have the case of an actual price fixed, and

that actual price reduced in consequence of the constitution on a particular portion of an estate of a new holding or holdings as proposed in a scheme under this Act. In that case you would have the difference between the price fixed before the scheme had been introduced and the amount which could be obtained for the estate after the introduction of the scheme, but it makes no difference as regards principle that you have not two actual figures which are convenient for the purposes of comparison. There is hardly a compensation case in which the arbiter has not to consider potential value. He has to determine it partly in reference to the evidence brought before him, and partly in reference to his own skill and knowledge.

My Lords, I should like to say one word in conclusion as regards an argument adduced by the Solicitor-General, in which he said that this interpretation might interfere with the general use of this statute. I do not follow that argument at all. The selection of the particular site is for the authority constituted under the Act, and prima facie one would suppose that a site would be selected in which the damage to the rest of the estate would be as small as possible, but even assuming that, in order to carry out the purposes of the Act, damage, and considerable damage, is done, as in the present case, it appears to me that on every principle the owner is entitled to compensation. If you take any other principle except that, it means that some particular owner suffers a particular injury for what is, after all, a matter of public concern and of national importance. The object of all compensation law is to meet cases of that kind, because when you have met them you may assume that whatever charge is placed upon persons in connection with a matter of public and national importance, it is spread equally and equitably amongst all parties and all persons.

My Lords, I can find no difficulty whatever in the present case, and it appears to me that the decision of the Inner House is right and should be affirmed.

LORD WRENBURY. My Lords, I agree, and I find it unnecessary to state anew the same opinion in different words. It suffices that I should say that, in my judgment, the arbitrator had jurisdiction

H. L. (Sc.) 1916

BOARD OF AGRICULTURE FOR SCOTLAND v. PLUMMER.

to allow this compensation, because the statute expressly authorized its allowance.

Interlocutor of the Second Division of the Court of Session in Scotland affirmed and appeal dismissed with costs.

Lords' Journals, January 18, 1916.

Agent for appellants: *John Kennedy, W.S., for Sir Henry Cook, W.S., Edinburgh.*

Agents for respondent: *Francis & Johnson, for Mylne & Campbell, W.S., Edinburgh.*

[HOUSE OF LORDS.]

H. L. (E.)* 1916 *Feb.* 8.

HERBERT MORRIS, LIMITED . . . . . APPELLANTS;

AND

SAXELBY . . . . . RESPONDENT.

Restraint of Trade—Special Branch of Engineering Business—Employer and Servant—Restraint for Seven Years extending to United Kingdom—Reasonableness.

In determining whether a covenant in restraint of trade is enforceable, a covenant exacted by the purchaser from the vendor on a sale of the goodwill of a business stands on a different footing from a covenant exacted by an employer against his employee; and *semble* in the latter case a covenant against competition per se will not be enforced.

The plaintiff company were the leading manufacturers of hoisting machinery in the United Kingdom, and the defendant had been in the company's employment as draughtsman and otherwise from the time he left school. After several years' service the defendant was engaged by the company as engineer for two years certain and thereafter, subject to four months' notice on either side, upon the terms of an agreement which contained a covenant by the defendant with the company that he would not during a period of seven years from his ceasing to be employed by the company, either in the United Kingdom of Great Britain or Ireland, carry on either as principal, agent,

---

* *Present:* LORD ATKINSON, LORD SHAW OF DUNFERMLINE, LORD PARKER OF WADDINGTON, and LORD SUMNER.

servant, or otherwise, alone or jointly or in connection with any other person, firm, or company, or be concerned or assist, directly or indirectly, whether for reward or otherwise, in the sale or manufacture of pulley blocks, hand overhead runways, electric overhead runways, or hand overhead travelling cranes :—

Held, that the covenant was wider than was required for the protection of the plaintiff company and was not enforceable.

Decision of the Court of Appeal [1915] 2 Ch. 57 affirmed.

APPEAL from an order of the Court of Appeal affirming a judgment of Sargant J. (1)

The appellants were the plaintiffs and the respondent was the defendant in an action to enforce a covenant in restraint of trade, and the sole question at issue was as to the enforceability of the covenant.

The appellants carried on the business of engineers, their special and main line of business being the manufacture and sale of lifting machinery, particularly pulley blocks, runways, and travelling cranes, for which they had acquired a great reputation. Their head office and works were at Loughborough, and they had branch offices in London, Manchester, Birmingham, Glasgow, Cardiff, Leeds, Newcastle, and Sheffield. They had no branch office but employed a traveller in Ireland. They were the largest makers of lifting machinery in the United Kingdom. The appellants had devoted much time and money to collecting and tabulating information of various kinds for use in their business. In particular they got out and arranged a large number of charts called E charts, which gave details of their manufacture and particulars of the strengths of the materials employed, and contained a large amount of technical information as the result of experiments made by the appellants and their employees. They also had drawings called L sheets, comprising tables and curves indicating the strength and composition of the materials required for any particular job. All these documents were treated as confidential, and though they were handed out from time to time to the appellants' employees, stringent precautions were taken to ensure their return.

The respondent on leaving school entered into the employment of the appellants in February, 1901, as a junior draughtsman,

(1) [1915] 2 Ch. 57.

H. L. (E.
1916
HERBERT MORRIS, LIMITED v. SAXELBY.

being then aged fifteen. In 1906 he became leading draughtsman in the department of pulley blocks, hand overhead travelling cranes, and hand overhead runways. In 1908 he was appointed resident engineer at the appellants' Cardiff branch, and in 1909 he became their manager and resident engineer in London. In 1910 he was sent back to Loughborough, where he took charge of departments connected with the sale of pulley blocks and with Admiralty contracts. On March 17, 1911, he entered into an agreement with the appellants whereby he was to be employed from February 7, 1911, as an engineer for two years certain, and thereafter subject to four weeks' notice on either side, at a salary of 3*l.* 17*s.* 6*d.* per week. And the agreement contained the following clauses :—

"6. The employee shall not during his employment nor at any time afterwards divulge nor communicate to any person corporation or firm any information which he may receive or obtain in relation to the company's affairs and customers and all instructions drawings notes and memoranda made by the employee or which may come into his possession while engaged as aforesaid shall be the exclusive property of the company.

"7. In consideration of the agreement hereinbefore contained the employee covenants and agrees with the company their successors and assigns that he will not at any time during a period of seven years from the date of his ceasing to be employed by the company whether under this agreement or otherwise howsoever either in the United Kingdom of Great Britain or Ireland carry on either as principal agent servant or otherwise alone or jointly or in connection with any other person firm or company or be concerned or assist directly or indirectly whether for reward or otherwise in the sale or manufacture of pulley blocks hand overhead runways electric overhead runways hand overhead travelling cranes or any part thereof or be concerned or assist as aforesaid in any business connected with such sale or manufacture."

These clauses were substantially a repetition of clauses contained in an agreement of July 16, 1906, which the respondent was required by the appellants to sign immediately on his attaining the age of twenty-one, when he was employed as leading draughtsman, except that the clause restricting the respondent

from carrying on trade in competition with the appellants did not include in the prohibited articles electric overhead runways.

The respondent left the appellants' service on April 19, 1913. During the last six months of his service he attempted to obtain employment in various engineering firms which did not compete with the appellants, but having failed in these efforts, in May, 1913, he entered into the employment of Messrs. Derome, who carried on the business of engineers and manufacturers of lifting machinery at Bavay in France. On February 28, 1914, he left Messrs. Derome and entered into the employment of Vaughan & Sons, Limited, of Manchester, who were manufacturers of lifting machinery and competitors in trade of the appellants.

Thereupon the appellants commenced this action against the respondent claiming injunctions restraining him from committing breaches of clauses 6 and 7 of the agreement of March 17, 1911. At the trial, however, the appellants abandoned their claim under clause 6, and they did not claim to enforce the last words of clause 7 "or any part thereof or be concerned as aforesaid in any business connected with such sale or manufacture."

Sargant J. dismissed the action. The learned judge said that from the point of view of the employers alone he was not prepared to hold that the covenant was unreasonable as regards either time or space, having regard to the very special character of the work, and if the question were one between a vendor and purchaser he would feel compelled to give effect to it; but he held that it was unreasonable to the defendant and prejudicial to the public and was therefore not enforceable. This decision was affirmed by the Court of Appeal by a majority (Lord Cozens-Hardy M.R. and Joyce J., Phillimore L.J. dissenting).

1915. Nov. 4, 5, 8, 22, 23. *Sir Robert Finlay, K.C.*, and *A. J. Walter, K.C.* (with them *Kerly, K.C.*), for the appellants. The sole test of the enforceability of a covenant in restraint of trade is whether, looking at all the circumstances of the case,—the nature of the covenantee's business and the character of the employment —the restriction is reasonably required for the protection of the covenantee. In the special circumstances of the present case the covenant in question is not too wide. The covenant is so limited as

H. L. (E.) 1916 — HERBERT MORRIS, LIMITED v. SAXELBY.

to the prohibited articles as that it would not prevent the respondent from obtaining any kind of general engineering employment. If the restriction is reasonably required for the protection of the appellants it is not contrary to public policy. The authorities establish the following propositions:—1. Inasmuch as the object of the restraint is the protection of property, a restraint which is not wider than is reasonably necessary for that purpose will be enforced. 2. Owing to the changing conditions of modern commerce and the greater facilities of modern locomotion, a larger restraint than formerly may now be held good. 3. No distinction can be drawn between vendor and purchaser and master and servant, except in so far as there may be a personal equity in the servant in cases of oppression. 4. No distinction can be drawn between what has been called the objective and the subjective knowledge of the covenantor; the covenant applies to all forms of competition whether as regards secret information or as regards skill acquired in the employer's service. 5. Possibly a restraint which is likely to create a pernicious monopoly may be held bad on public policy notwithstanding that it is reasonable in the interests of the parties. That question, however, does not arise in the present case. As to the authorities: the law laid down by Parker C.J. in *Mitchel* v. *Reynolds* (1) has been relaxed in modern times in various respects, and in particular as regards the questions of adequacy of consideration and onus of proof. So also the statement of Best C.J. in *Homer* v. *Ashford* (2) that any covenant which binds a person not to employ his talents, his industry, or his capital in any useful undertaking in the kingdom would be void no longer holds good because the increased facilities for commercial intercourse existing at the present time may render necessary a restraint extending over the whole kingdom. In *Hitchcock* v. *Coker* (3) Tindal C.J. upheld a covenant imposing upon a servant a restraint unlimited in point of time, and the ground of the decision was that it was necessary for the protection of the master's property. In *Mallan* v. *May* (4), which was also a case of master and servant, Parke B. says that the test is

(1) (1711) 1 P. Wms. 181; 1 Sm. L. C. (12th ed.) 458.
(2) (1825) 3 Bing. 322, 326.
(3) (1837) 6 Ad. & E. 438.
(4) (1843) 11 M. & W. 653.

what is required for the reasonable protection of the party with whom the contract is made. He there deals both with the sale of the goodwill of a business and with the relation of master and servant, and he draws no distinction between the two cases. He also puts the objective and subjective elements of the knowledge acquired by the servant in his master's employment on exactly the same footing. In *Tallis* v. *Tallis* (1), where a very wide restriction was upheld, Lord Campbell shows how *Mitchel* v. *Reynolds* (2) has been modified by subsequent decisions, and in that case the Court threw on the defendant the burden of proving that the restraint was larger than was required for the protection of the plaintiff. The law as to the onus of proof in the case of partial restraints was stated in the same way by Fry J., relying on the dictum of Jessel M.R. in *Printing and Numerical Registering Co.* v. *Sampson* (3) as to the danger of interfering with freedom of contract, in *Rousillon* v. *Rousillon* (4), by Lindley L.J. in *Mills* v. *Dunham* (5), and by Chitty J. in *Badische Anilin und Soda Fabrik* v. *Schott, Segner & Co.* (6) *Rousillon* v. *Rousillon* (4) is also an authority for the proposition that there is no absolute rule of law that a covenant unlimited in point of space is void. This view was approved by the Court of Appeal and the House of Lords in *Maxim Nordenfelt Guns and Ammunition Co.* v. *Nordenfelt* (7), where a covenant unlimited in point of space and practically unlimited in point of time was enforced. Lord Macnaghten in his well-known definition says that it is a sufficient justification for the covenant if the restriction is reasonable in the interests of the parties concerned and reasonable in the interests of the public. But a covenant which does not go beyond the reasonable protection of the covenantee is really for the interest of the covenantor also, for otherwise there would be less employment for possible workmen. Nor would such a covenant be bad on the ground of public policy, except possibly for the reason suggested by Bowen L.J. in the Court below, that it might be an incident of a scheme for establishing a pernicious monopoly. The true test is that laid down

(1) (1853) 1 E. & B. 391, 410-412.
(2) 1 P. Wms. 181; 1 Sm. L. C. (12th ed.) 458.
(3) (1875) L. R. 19 Eq. 462, 465.
(4) (1880) 14 Ch. D. 351.
(5) [1891] 1 Ch. 576, 586.
(6) [1892] 3 Ch. 447.
(7) [1893] 1 Ch. 630; [1894] A. C. 535.

H. L. (E.) 1916 — HERBERT MORRIS, LIMITED v. SAXELBY.

by Lord Campbell in *Tallis* v. *Tallis* (1) which is adopted by Lord Macnaghten. The principle of the *Nordenfelt Case* (2) was applied to a contract of service in *E. Underwood & Son* v. *Barker* (3), where a covenant restraining the servant for twelve months from carrying on a rival business in the United Kingdom or in France, Belgium, Holland, or Canada was held good, at any rate so far as the United Kingdom was concerned, and in *Haynes* v. *Doman* (4), where the covenant was limited in point of space but was unlimited in point of time. In the latter case both Stirling J. and Lindley M.R. stated that the real reason for exacting these covenants was to prevent the disclosure of the secrets of the plaintiff's business to his trade rivals, inasmuch as the prohibition against disclosing trade secrets was practically worthless without the restriction against entering the employment of rivals. In *Sir W. C. Leng & Co.* v. *Andrews* (5), which was a case of a newspaper business in which the defendant was employed as a reporter, a restriction containing a space limit of twenty miles but no time limit was held unenforceable because there was no real danger to be protected against; but the dictum of Farwell L.J. that the doctrine stated by Lord Macnaghten does not mean that an employer can prevent an employee from using in his trade the skill and knowledge which he has acquired from his employer, but is limited to the revealing of trade secrets, is opposed to the whole current of authority and was not necessary for the decision of the case. The true view is that an employer is entitled to be protected against the use in a rival firm of the special skill and knowledge acquired by his employee in his employment, subject always to the question of reasonableness. In *Attorney-General of the Commonwealth of Australia* v. *Adelaide Steamship Co.* (6) Lord Parker of Waddington sums up the law on the subject of restraint of trade. *Mason* v. *Provident Clothing and Supply Co.* (7) contains a dictum of Lord Haldane on the question of onus which appears to be at variance with the earlier authorities; but it is not necessary in this case to argue the question of onus, because the appellants

(1) 1 E. & B. 391.
(2) [1894] A. C. 535.
(3) [1899] 1 Ch. 300.
(4) [1899] 2 Ch. 13.
(5) [1909] 1 Ch. 763.
(6) [1913] A. C. 781, 794-796.
(7) [1913] A. C. 724, 733, 740-741.

have the finding of Sargant J. in their favour that the restriction was not more than was reasonably required for their protection. The only passage which the appellants ask to have considered is that in which Lord Shaw draws a distinction between objective and subjective knowledge. It is submitted that there is no justification in the authorities for any such distinction. In *Eastes* v. *Russ* (1) it was held that the restriction was wider than was reasonably necessary for the plaintiff's protection, but the general principle of that case is not inconsistent with the appellants' argument. In the course of his employment the respondent acquired a knowledge of the appellants' highly specialized system of conducting business and had access to technical information of a confidential character which the appellants had spent much money in collecting, and the covenant may be supported on the trade secrets principle. The term "trade secrets" is not limited to secret processes, but extends to any information of a confidential character which is peculiar to the employer's business. At the present time it is just as much a part of public policy that a man should abide by his contract as that he should have the right to work. On the facts found by Sargant J. the appellants are entitled to judgment.

Romer, *K.C.*, and *Sheldon*, for the respondent. On the evidence the real object of this covenant is to restrain competition and nothing else. That will not be protected. All that is protected is the filching of the employer's property such as trade secrets or customers' connection. Here the employer is seeking to restrain the employee from enjoying something which is the property of the latter, namely, the chance of earning his livelihood by the exercise of the very trade which he has entered the employer's service to learn. The respondent cannot obtain employment in a general engineering firm because his training has been exclusively in one special branch. His special qualification is a hindrance to him. It cannot be for the public interest to enforce such a covenant. The case presented by the employer is exactly the same as in *Mason* v. *Provident Clothing and Supply Co.* (2) and is enforced by the same arguments. It is said that in considering what is necessary for the protection of the covenantee's

(1) [1914] 1 Ch. 468. (2) [1913] A. C. 724.

H. L. (E.) 1916

HERBERT MORRIS, LIMITED v. SAXELBY.

business the interest of the public may be wholly disregarded. But it is on public policy that these covenants are upheld just as much as it is on public policy that they are upset. In all these cases the interest of the public is to be considered. This point is important for the purpose of displacing the appellants' argument that there is no difference between the case of vendor and purchaser and employer and employee and no difference between objective and subjective knowledge. Lord Macnaghten aptly states the true proposition in the *Nordenfelt Case*. (1) In considering the interest of the public two conflicting principles have to be regarded—sanctity of contract and freedom of trade. It is clear that the public must have a much greater interest in upholding a covenant in restraint of trade as between vendor and purchaser, who are on an equal footing, than as between employer and employee, who are not. Again, it may well be in the public interest that such a covenant should be upheld when the object is to restrain the revelation of a secret process or the canvassing of customers; but how can it be in the public interest to restrain a man from carrying on the only trade which he knows? The only authority opposed to this view is the dictum of Parke B. in *Mallan* v. *May* (2), but his reasoning does not hold good at the present time. Where these covenants are upheld they are upheld solely in the public interest, and if there is no reason for upholding them they are bad, because the public interest is in favour of unrestricted trade. All the cases cited in which these covenants have been enforced are founded on the idea that the thing to be protected is part of the goodwill of the business. None of them support the proposition that competition per se can be restrained. In *Ward* v. *Byrne* (3), where the restriction was held to be too wide, Lord Abinger, in stating the object of these covenants, recognizes the right of every man to be free to earn his livelihood in the exercise of any lawful employment. Where, as in this case, the employee is taking away nothing that belongs to the employer the public have a direct interest in having the covenant upset. In the *Nordenfelt Case* (4) the decision turned on the fact that the covenant was entered into in connection with the sale of the goodwill of a

(1) [1894] A. C. 535, 565.
(2) 11 M. & W. 653, 666.
(3) (1839) 5 M. & W. 548, 560.
(4) [1894] A. C. 535.

business, and it is inconceivable that the decision would have been the same if the question had been between employer and employee. Both Lord Herschell and Lord Macnaghten take this distinction. The same distinction is drawn by Lord Haldane in *Mason* v. *Provident Clothing and Supply Co.* (1) and by Phillimore L.J. in *Eastes* v. *Russ.* (2) The principle for which the respondent contends is that stated by Farwell L.J. in *Sir W. C. Leng & Co.* v. *Andrews* (3), approved by Lord Shaw in *Mason's Case* (4), namely, that it is not for the public interest that an employer should be allowed to prevent a former employee from carrying on business in competition with him when all that the employee takes with him is the skill and knowledge acquired in his employer's service.

Kerly, K.C., in view of the fact that the hearing of the appeal had been interrupted and that both his learned leaders were engaged at the time in the Privy Council, was allowed, as a matter of grace, to reply.

The House took time for consideration.

1916. Feb. 8. LORD ATKINSON. My Lords, this is an appeal from an order of the Court of Appeal, dated the 31st day of March, 1915, affirming the judgment of Sargant J., dated the 30th day of October, 1914, and dismissing the action with costs. The appellants are the plaintiffs, and the respondent is the defendant. The action out of which the appeal arises was brought to restrain the respondent, a former servant of the appellants, (1.) from being concerned in the sale or manufacture of pulley blocks, hand overhead runways, electric overhead runways, hand overhead travelling cranes, or any part thereof, and (2.) from divulging or using confidential information acquired by him whilst in the service of the appellants.

This claim is based upon two covenants contained in an agreement under seal or indenture dated March 17, 1911, executed by the appellants and respondent, under which the respondent was to be employed for a period of two years certain from February 7, 1911, and thereafter subject to four weeks' notice on either side, at a

(1) [1913] A. C. 724, 731.
(2) [1914] 1 Ch. 468, 490.
(3) [1909] 1 Ch. 763, 773.
(4) [1913] A. C. 724, 740.

H. L. (E.) 1916

HERBERT MORRIS, LIMITED v. SAXELBY.

Lord Atkinson.

salary of 3*l.* 17*s.* 6*d.* per week. [His Lordship read clauses 6 and 7 of the agreement.]

It will be observed that there is no clause in covenant No. 6 prohibiting the "using" of information, as distinct from the divulging or communicating of it, and Joyce J. points out that nothing but an express provision against "using" the information would justify such an injunction as is claimed. The matter, though to a great extent immaterial, since the appellants admit they cannot establish that any breach of this covenant was committed by the respondent, or even threatened, is not without some significance inasmuch as it tends to show that what the appellants desired from the first was that the respondent should be restrained from using in the service of some other employer that skill and knowledge which he had acquired by the exercise of his own mental faculties on what he had seen, heard, and had experience of in the employment of the appellants themselves.

The appellants, feeling obviously the difficulty of defending the clause at the end of the seventh covenant running in these words, "or any part thereof, or be concerned as aforesaid in any business connected with such sale or manufacture," have consented to treat the covenant for the purposes of their action as if these words had been deleted, and are willing to take an injunction confined to what is prohibited by the remainder of the covenant.

The defence of the respondent is in effect this, that the restrictions imposed on him by this indenture go far beyond anything reasonably necessary for the protection of the plaintiffs in their trade or business, are oppressive to him, and that, being in restraint of trade, either the entire agreement, or at all events covenant No. 7, is not binding upon him.

By the word "oppressive" I take it that it is not meant that the respondent was induced to enter into this agreement by fraud, misrepresentation, deceit, or forced to enter into it by such duress as would entitle him in a Court of Equity to have it set aside whether it referred to his trade or not, but "oppressive" in the sense that it would, if enforced, deprive him for a lengthened period of the power of employing, in any part of the United Kingdom, that mechanical and technical skill and knowledge which, as I have said, his own industry, observation, and intelligence have enabled him

to acquire in the very specialized manufacturing business of the appellants, thus forcing him to begin life afresh, as it were, and depriving him of the means of supporting himself and his family.

If that is what is meant, then such oppression, if it existed, does not concern him alone. The general public suffer with him, for it is in the public interest that a man should be free to exercise his skill and experience to the best advantage for the benefit of himself and of all those who desire to employ him. And, in cases like the present, the public interest in respect of such restrictions and the interest of the covenantor if they are not conterminous certainly overlap.

It is quite true, as the Master of the Rolls points out, that, as things now are, two principles or views of public policy come into conflict in such cases as this, namely, freedom of trade and freedom of contract. While the community is vitally interested in trade being free, it is also vitally interested in people being free to contract and being held to their contracts.

The facts are all before the House, so one need not be troubled with the question upon whose shoulders, those of the covenantor or those of the covenantee, the burden of proof rests.

I think it has been generally assumed that the law upon this subject of the validity or invalidity of contracts in restraint of trade has been authoritatively determined by the decision of this House in the *Nordenfelt Case* (1), as it is, for the sake of brevity, commonly called, and that it is laid down in the clearest and most happily selected language in the oft-quoted passage of the judgment of Lord Macnaghten, so that it is, I think, no longer necessary to refer to the earlier authorities. The passage runs thus: "The true view at the present time, I think, is this: The public have an interest in every person's carrying on his trade freely: so has the individual. All interference with individual liberty of action in trading, and all restraints of trade of themselves, if there is nothing more, are contrary to public policy, and therefore void. That is the general rule. But there are exceptions: restraints of trade and interference with individual liberty of action may be justified by the special circumstances of a particular case. It is a sufficient justification, and indeed it is the only justification, if the restriction

(1) [1894] A. C. 535, 565.

H. L. (E.) 1916 HERBERT MORRIS, LIMITED v. SAXELBY. Lord Atkinson.

is reasonable—reasonable, that is, in reference to the interest of the parties concerned and reasonable in reference to the interest of the public, so framed and so guarded as to afford adequate protection to the party in whose favour it is imposed, while at the same time it is in no way injurious to the public. That, I think, is the fair result of all the authorities."

It will be observed that Lord Macnaghten uses the plural, "parties concerned," in the earlier portion of this passage, meaning, apparently, to include both the covenantor and covenantee, while in the latter portion of the passage he merely speaks of "protection" being given to the covenantee, which does not injure the public. But in the opening lines of the passage he had already said that the individual (here the covenantor), as well as the public, have an interest in freedom of trading.

If it be assumed, as I think it must be, that no person has an abstract right to be protected against competition per se in his trade or business, then the meaning of the entire passage would appear to me to be this. If the restraint affords to the person in whose favour it is imposed nothing more than reasonable protection against something which he is entitled to be protected against, then as between the parties concerned the restraint is to be held to be reasonable in reference to their respective interests, but notwithstanding this the restraint may still be held to be injurious to the public and therefore void; the onus of establishing to the satisfaction of the judge who tries the case facts and circumstances which show that the restraint is of the reasonable character above mentioned resting upon the person alleging that it is of that character, and the onus of showing that, notwithstanding that it is of that character, it is nevertheless injurious to the public and therefore void, resting, in like manner, on the party alleging the latter.

In the case of *Leather Cloth Co.* v. *Lorsont* (1), a case, no doubt, of the sale of the goodwill of a business, I find James V.-C. also used the phrase "not unreasonable for the protection of the parties," meaning both covenantor and covenantee. Dealing with the contention that a general restraint of trade throughout the United Kingdom is bad on the face of it, he says: "I do not read

(1) (1869) L. R. 9 Eq. 345, 353.

the cases as having laid down that unrebuttable presumption. . . . . All the cases, when they come to be examined, seem to establish this principle, that all restraints upon trade are bad as being in violation of public policy, unless they are natural, and not unreasonable for the protection of the parties in dealing legally with some subject matter of contract. The principle is this: Public policy requires that every man shall be at liberty to work for himself, and shall not be at liberty to deprive himself or the State of his labour, skill, or talent, by any contract that he enters into. On the other hand, public policy requires that when a man has by skill or by any other means obtained something which he wants to sell, he should be at liberty to sell it in the most advantageous way in the market; and in order to enable him to sell it advantageously in the market it is necessary that he should be able to preclude himself from entering into competition with the purchaser. In such a case the same public policy that enables him to do that does not restrain him from alienating that which he wants to alienate, and, therefore, enables him to enter into any stipulation however restrictive it is, provided that restriction in the judgment of the Court is not unreasonable, having regard to the subject matter of the contract."

These considerations in themselves differentiate, in my opinion, the case of the sale of goodwill from the case of master and servant or employer and employee. The vendor in the former case would in the absence of some restrictive covenant be entitled to set up in the same line of business as he sold in competition with the purchaser, though he could not solicit his own old customers. The possibility of such competition would necessarily depreciate the value of the goodwill. The covenant excluding it necessarily enhances that value, and presumably the price demanded and paid, and, therefore, all those restrictions on trading are permissible which are necessary at once to secure that the vendor shall get the highest price for what he has to sell and that the purchaser shall get all he has paid for. Restrictions on freedom of trading are in both classes of case imposed, no doubt, with the common object of protecting property. But the resemblance between them, I think, ends there.

In all cases such as this, one has to ask oneself what are the interests of the employer that are to be protected, and against what is he entitled to have them protected.

H. L. (E.)
1916
HERBERT MORRIS, LIMITED v. SAXELBY.
Lord Atkinson.

He is undoubtedly entitled to have his interest in his trade secrets protected, such as secret processes of manufacture which may be of vast value. And that protection may be secured by restraining the employee from divulging these secrets or putting them to his own use. He is also entitled not to have his old customers by solicitation or such other means enticed away from him. But freedom from all competition per se apart from both these things, however lucrative it might be to him, he is not entitled to be protected against. He must be prepared to encounter that even at the hands of a former employee.

I now turn to the facts to endeavour to ascertain what it is in reality that the appellants seek to be protected against. They are very successful manufacturers of the class of machinery already mentioned. They have specialized in it—standardizing many parts common to different types of machines. Though they make some other machinery, this kind constitutes three-fourths of their output. In this manufacture they appear to be the premier firm in England. Their business is very extended. Their head offices are at Loughborough. They have branch offices at London, Manchester, Birmingham, Leeds, Sheffield, Newcastle, Cardiff, and Glasgow. They have a traveller in Ireland, but no office. Their regular and apparently principal customers, as appears from the evidence of their managing director, Mr. H. Morris, are the Admiralty, the War Office, the Government Ordnance Factory, numerous foreign and colonial Governments, railway companies both at home and abroad, and, more recently, the Aircraft Department and the torpedo factories. No other customers are named. And there is nothing to show that the respondent ever came into personal relations with any of the officers of these departments or undertakings, or that through his acquaintance or personal influence with any of them he might be able to divert their custom from the appellants to any other firm.

There is, I think, no danger whatsoever of anything of that kind. The enticing away of customers is, therefore, really out of the question and may, I think, be put aside. In addition, the appellants have thoroughly organized their business, both on the manufacturing and commercial side of it. They have got up and arranged in an elaborate, careful, and systematic manner a large number of

charts, called E charts. These give details of manufacture, charts of strength of materials, and facts ascertained by experience in the carrying on of their various works. They have also drawings, called L sheets, comprising tables and plotted curves, indicating the composition and dimensions suitable for particular jobs. They have drawings of special machines, and elaborate indices of the cost of every piece of machinery turned out by them, as well as minute tabulated details of every job obtained or tendered for. They have kept records of the instructions sent out from time to time as to the method of doing various kinds of work. In addition, they have on the commercial side collected and tabulated information as to the requirements of existing customers and probable requirements of prospective ones, so as to keep a record of the work done for the first class, and to determine what kind of advertisements they should send to the second.

All the documents are highly confidential. They are handed out from time to time to the employees; but it is always seen to that they are traced and returned. The information they contain is so detailed and minute that it would be impossible for any employee to carry it away in his head. He might retain the recollection of the general character and principle of the elaborate scheme of organization, but no more. Sargant J. has found all these facts. But this tabulated information is not in the nature of a trade secret, such as a secret process of manufacture. The sheets, cards, and formulae and other documents of the kind described are private and confidential documents, the property of the appellants. Clause 6 rightly and fully protects them against a disclosure of them. A breach of that covenant has not been proved or even threatened.

It is claimed, however, by the appellants that this organization and general method of business are trade secrets which the respondent is not entitled either to divulge to another, or use his knowledge of them in the service of any persons other than themselves.

The respondent cannot, however, get rid of the impressions left upon his mind by his experience on the appellants' works; they are part of himself; and in my view he violates no obligation express or implied arising from the relation in which he stood to the appellants by using in the service of some persons other than them

H. L. (E.)
1916
HERBERT MORRIS, LIMITED v. SAXELBY.
Lord Atkinson.

the general knowledge he has acquired of their scheme of organization and methods of business.

It is moreover, in my view, perfectly clear upon the evidence of their managing director reported at pp. 31 and 32 of the appendix that the danger against which the appellants desired to be protected is neither the enticing away of customers, nor the divulgence or use and employment of any trade secret. It is this, that the respondent would carry away and might put to use in the establishment of their trade rivals the superior skill and knowledge he, the respondent, has by his talent acquired in their works, raise the character of the output of those rivals, improve their methods, and thereby make them more formidable competitors of the appellants in their trade.

That, I think, is plain, and every word of the able and convincing judgment of Farwell L.J. in *Sir W. C. Leng & Co.* v. *Andrews* (1) applies. After quoting the passage from the judgment of Lord Macnaghten which I have already quoted, the Lord Justice said: "The argument which has been addressed to us on behalf of the respondents does not bring the case within that doctrine. That doctrine does not mean that an employer can prevent his employee from using the skill and knowledge in his trade or profession which he has learnt in the course of his employment by means of directions or instructions from the employer. That information and that additional skill he is entitled to use for the benefit of himself and the benefit of the public who gain the advantage of his having had such admirable instruction. The case in which the Court interferes for the purpose of protection is where use is made, not of the skill which the man may have acquired, but of the secrets of the trade or profession which he had no right to reveal to any one else—matters which depend to some extent on good faith. A good deal has been said about organization. The evidence is singularly scanty in regard to details upon the exact meaning of that word in the present case; but I apprehend that a man who goes into an office is entitled to make use in any other office, whether his own or that of another employer, of the knowledge which he has acquired in the former of details of office organization, such as the establishment of one department with a chief or head and grades of subordinates under him, the desirability of establishing local centres of information in various towns and

(1) [1909] 1 Ch. 763, 773.

villages round about Sheffield, and the like. To acquire the knowledge of the reasonable mode of general organization and management of a business of this kind, and to make use of such knowledge, cannot be regarded as a breach of confidence in revealing anything acquired by reason of a person having been in any particular service, although the person may have learnt it in the course of being taught his trade; but it would be a breach of confidence to reveal trade secrets, such as prices, &c., or any secret process or things of a nature which the man was not entitled to reveal."

I think that passage is thoroughly sound. It was contended that it was open to the respondent even if restrained by the injunction asked for to earn his living as a general engineer.

To answer that it is only necessary to consider what was his training. He was twenty-nine years of age last July. In February, 1901, he, at the age of fifteen or sixteen years, entered the appellants' employment as a junior draughtsman. Before he reached twenty-one years of age he had become leading draughtsman in a department dealing with pulley blocks, hand overhead runways, and hand overhead travelling cranes; but not up to then with electric overhead runways. His salary was 50*s*. per week. His work had been confined to this special branch of manufacture. He had no experience of any other. Yet immediately on coming of age he was required to sign an agreement dated July 16, 1906, containing a prohibitive clause similar to that now sued upon, save that electric overhead runways are not mentioned in it.

Thus before ever he had acquired that varied knowledge and experience of the different branches of the appellants' business, the possession of which by him is now urged as the justification for the covenants relied on, he was similarly bound. This fact strongly suggests that what really prompted to the making of this agreement of July, 1906, was the fear that the respondent's skill as a draughtsman might be put at the service of a rival in trade.

From March, 1908, to February, 1909, he was at the appellants' establishment in Cardiff as resident engineer, so that up to this his knowledge and experience was confined to the engineering side of this specialized business. In February, 1909, he was transferred to London to manage the selling branch of the business. In 1910 he was sent to Loughborough to take charge of the selling

H. L. (E.) 1916

HERBERT MORRIS, LIMITED v. SAXELBY.

Lord Atkinson.

department in connection with the sale of pulley-block and Admiralty contracts. He continued there till he left the appellants' employment in April, 1913. Thus his whole engineering training was connected with the manufacture of these four special machines and their component parts.

He says he has tried to get employment as a general engineer and has failed, and he was therefore obliged, being unable to live in France, to take service with one of the appellants' rivals.

I doubt very much if with his want of experience of any kind of engineering other than the one he will ever, or at least for a length of time, be able to obtain employment as a general engineer. This would at all events appear certain, that he can only employ his skill and training to the most advantage both to the community and himself by engaging in that class of business in which he has passed his whole working life.

On the whole, therefore, I am of opinion that this agreement, binding for a period of seven years, and applying to the whole of the three kingdoms, is not, having regard to all the circumstances of the case, reasonable in reference to the respective interests of the parties concerned, and is prejudicial to the interests of the public. I accordingly think that the order appealed from was right and should be affirmed, and this appeal should be dismissed with costs.

LORD PARKER OF WADDINGTON. (1) My Lords, in the case of *Nordenfelt* v. *Maxim Nordenfelt Co.* (2) Lord Macnaghten considered most if not all of the prior cases relating to contracts in restraint of trade and came to certain conclusions. I had to consider them in the case of *Attorney-General of the Commonwealth of Australia* v. *Adelaide Steamship Co.* (3), and I adhere to everything I then said. As I read Lord Macnaghten's judgment, he was of opinion that all restraints on trade of themselves, if there is nothing more, are contrary to public policy, and therefore void. It is not that such restraints must of themselves necessarily operate to the public injury, but that it is against the policy of the common law to enforce them except in cases where there are special circumstances

(1) Read by Lord Sumner. (2) [1894] A. C. 535.
(3) [1913] A. C. 781.

to justify them. The onus of proving such special circumstances must, of course, rest on the party alleging them. When once they are proved, it is a question of law for the decision of the judge whether they do or do not justify the restraint. There is no question of onus one way or another.

It will be observed that in Lord Macnaghten's opinion two conditions must be fulfilled if the restraint is to be held valid. First, it must be reasonable in the interests of the contracting parties, and, secondly, it must be reasonable in the interests of the public. In the case of each condition he lays down a test of reasonableness. To be reasonable in the interests of the parties the restraint must afford adequate protection to the party in whose favour it is imposed; to be reasonable in the interests of the public it must be in no way injurious to the public.

With regard to the former test, I think it clear that what is meant is that for a restraint to be reasonable in the interests of the parties it must afford *no more than* adequate protection to the party in whose favour it is imposed. So conceived the test appears to me to be valid both as regards the covenantor and covenantee, for though in one sense no doubt it is contrary to the interests of the covenantor to subject himself to any restraint, still it may be for his advantage to be able so to subject himself in cases where, if he could not do so, he would lose other advantages, such as the possibility of obtaining the best terms on the sale of an existing business or the possibility of obtaining employment or training under competent employers. As long as the restraint to which he subjects himself is no wider than is required for the adequate protection of the person in whose favour it is created, it is in his interest to be able to bind himself for the sake of the indirect advantages he may obtain by so doing. It was at one time thought that, in order to ascertain whether a restraint were reasonable in the interests of the covenantor, the Court ought to weigh the advantages accruing to the covenantor under the contract against the disadvantages imposed upon him by the restraint, but any such process has long since been rejected as impracticable. The Court no longer considers the adequacy of the consideration in any particular case. If it be reasonable that a covenantee should, for his own protection, ask for a restraint, it is in my opinion equally reasonable that the

H. L (E.) 1916

HERBERT MORRIS, LIMITED v. SAXELBY.

Lord Parker of Waddington.

covenantor should be able to subject himself to this restraint. The test of reasonableness is the same in both cases.

It was suggested in argument that the interests of the public ought to be considered and weighed in determining whether a restraint is reasonable in the interests of the parties. I dissent from this view. It would, indeed, entirely destroy the value of Lord Macnaghten's tests of reasonableness. The first question in every case is whether the restraint is reasonable in the interests of the parties. If it is not, the restraint is bad. If it is, it may still be shown that it is injurious to the public, though, as I pointed out in the case referred to, the onus of so showing would lie on the party alleging it.

My Lords, it appears to me that Lord Macnaghten's statement of the law requires amplification in another respect. If the restraint is to secure no more than "adequate protection" to the party in whose favour it is imposed, it becomes necessary to consider in each particular case what it is for which and what it is against which protection is required. Otherwise it would be impossible to pass any opinion on the adequacy of the protection.

In the *Nordenfelt Case* (1) that which it was required to protect was the goodwill of a business transferred by the covenantor to the covenantee, and that against which protection was sought was competition by the covenantor throughout the area in which such business was carried on. Under the particular circumstances of the case a world-wide covenant against competition was held no more than adequate for the purchaser's protection. It was argued before your Lordships that no distinction can be drawn between the position of the purchaser of the goodwill of a business taking such a covenant from his vendor and the case of the owner of a business taking such a covenant from his servant or apprentice. In both cases it was said that the property to be protected was the same and the dangers to be guarded against the same. I am of opinion that this argument cannot be accepted. The distinction between the two cases is, I think, quite clear, and is recognized both by Lord Macnaghten and Lord Herschell in the *Nordenfelt Case*. (1) The goodwill of a business is immune from the danger of the owner exercising his personal knowledge and skill to its detriment, and

(1) [1894] A. C. 535.

if the purchaser is to take over such goodwill with all its advantages it must, in his hands, remain similarly immune. Without, therefore, a covenant on the part of the vendor against competition, a purchaser would not get what he is contracting to buy, nor could the vendor give what he is intending to sell. The covenant against competition is, therefore, reasonable if confined to the area within which it would in all probability enure to the injury of the purchaser.

It is quite different in the case of an employer taking such a covenant from his employee or apprentice. The goodwill of his business is, under the conditions in which we live, necessarily subject to the competition of all persons (including the servant or apprentice) who choose to engage in a similar trade. The employer in such a case is not endeavouring to protect what he has, but to gain a special advantage which he could not otherwise secure. I cannot find any case in which a covenant against competition by a servant or apprentice has, as such, ever been upheld by the Court. Wherever such covenants have been upheld it has been on the ground, not that the servant or apprentice would, by reason of his employment or training, obtain the skill and knowledge necessary to equip him as a possible competitor in the trade, but that he might obtain such personal knowledge of and influence over the customers of his employer, or such an acquaintance with his employer's trade secrets as would enable him, if competition were allowed, to take advantage of his employer's trade connection or utilize information confidentially obtained.

As might be expected, where the cases are so numerous, it is not impossible to find dicta pointing to a contrary conclusion. I refer in especial to what was said by Parke B. in *Mallan* v. *May* (1), but even here it is to be observed that counsel in argument supported the validity of the covenant, on the ground that it was no more than was necessary to prevent the defendant from availing himself of the knowledge he had acquired in the plaintiff's service to interfere with the plaintiff's customers. If a covenant restraining competition by an employee were in itself reasonable, it is difficult to see why the Court has considered in almost every case whether such covenant could be justified as no more than sufficient to protect trade connection and trade secrets.

(1) 11 M. & W. 653.

H. L. (E.)
1916
HERBERT MORRIS, LIMITED v. SAXELBY.
Lord Parker of Waddington.

The point did not arise for actual decision until *Sir W. C. Leng & Co.* v. *Andrews*. (1) In that case the covenantor was a newspaper reporter. He did not in the course of his employment come across the covenantee's customers, nor was he entrusted by his employers with any confidential information whatever. The effect of the covenant, therefore, was merely to prevent him using his personal skill and knowledge within the limited area mentioned in the covenant; in other words, it was merely to preclude competition. In these circumstances it was unanimously held that the covenant was bad.

In *Mason* v. *Provident Clothing and Supply Co.* (2) it was argued, apparently for the first time in this class of case, that an employer might reasonably say "I will not have the skill and knowledge acquired in my employment imparted to my trade rivals," and that the validity of the restraint did not depend upon personal contact with the employer's customers, but upon the fact that the employee gained that general knowledge which put him into a position to compete with his master and made him a source of danger, against which the master was entitled to protect himself.

This argument was rejected by your Lordships' House, and the restraint in question was held bad, as being wider than was necessary to protect the employer from injury by misuse of the employee's acquaintance with customers or knowledge of trade secrets. In fact the reason, and the only reason, for upholding such a restraint on the part of an employee is that the employer has some proprietary right, whether in the nature of trade connection or in the nature of trade secrets, for the protection of which such a restraint is—having regard to the duties of the employee—reasonably necessary. Such a restraint has, so far as I know, never been upheld, if directed only to the prevention of competition or against the use of the personal skill and knowledge acquired by the employee in his employer's business.

My Lords, it remains to apply what I have said to the particular circumstances of the present case. Mr. Herbert Morris, the managing director of the plaintiff company, very candidly admitted that the real object of the plaintiff company in imposing the restraint was to preclude competition on the part of the defendant after he

(1) [1909] 1 Ch. 763. (2) [1913] A. C. 724.

had left the company's employment. The company objected, he said, to skill and knowledge acquired in its service being put at the disposition of any trade rival, and the skill and knowledge he referred to was the general skill and knowledge which an employee of any ability must necessarily obtain as opposed to knowledge of any matter and skill in any process in which the company could be said to have any property at all. To use Lord Shaw's metaphor in *Mason* v. *Provident Clothing and Supply Co.* (1), it was " subjective " as opposed to " objective " skill and knowledge; or, to use the expression of Joyce J. in this case, it was skill and knowledge " which were his own," and in no sense the plaintiffs' property. As directed against competition or against the use of this skill and knowledge, I am clearly of opinion that the restraint was in no way required for the plaintiffs' protection, and therefore unreasonable and bad in law.

An attempt was, however, made in argument to justify the restraint on the ground that it was no more than adequate for the protection of the plaintiffs' trade connection and trade secrets. I am of opinion that this attempt completely failed. With regard to the plaintiffs' connection, there is little or no evidence that the defendant ever came into personal contact with the plaintiffs' customers. For a period, it is true, he was manager of the London branch of the plaintiffs' business, and for another period sales manager at Loughborough. With the exception of these periods he was employed entirely in the engineering department. Had the restraint been confined to London and Loughborough and a reasonable area round each of these centres, it might possibly have been supported as reasonably necessary to protect the plaintiffs' connection, but a restraint extending over the United Kingdom was obviously too wide in this respect.

With regard to trade secrets, I am not satisfied that the defendant was entrusted with any trade secret in the proper sense of the word at all. Mr. Walter boldly argued that the expression trade secrets ought to be extended so as to include everything which Mr. Morris claimed to be peculiar to the plaintiffs' method of carrying on their business.

I will assume that the matters referred to by Mr. Walter are in

(1) [1913] A. C. 724.

H. L. (E.) 1916 HERBERT MORRIS, LIMITED v. SAXELBY. Lord Parker of Waddington.

fact peculiar to the plaintiffs' business, though I can hardly regard Mr. Morris's uncorroborated evidence as very satisfactory proof that the practices in question were unknown to other firms. Still, the manner in which Sargant J. dealt with this part of the case appears to me to be unanswerable. Though the defendant had access to the E charts, the L sheets, the drawings of special machines, the costs index, and other documents, all of which may be considered confidential, these documents were far too detailed for the defendant to carry away the contents thereof in his head. All that he could carry away was the general method and character of the scheme of organization practised by the plaintiff company. Such scheme and method can hardly be regarded as a trade secret. The same applies to the plaintiff company's system of standardizing mechanical apparatus capable of being used in more than one class of machine. The nearest approach that I can find in the evidence to anything in the nature of a trade secret is the mention of certain formulae, said to be based on the plaintiffs' experience, and to be more trustworthy than Molesworth's formulae for similar purposes.

During the course of the argument your Lordships asked for but failed to obtain these formulae, and therefore I am unable to judge whether they are such that the defendant could carry them in his memory. I therefore cannot attach any great importance to them. It would be a point of some difficulty whether the possession by an employee of a single trade secret would justify a restraint as wide as that in the present case, but under the circumstances I do not consider that this point really arises.

In my opinion the case falls within your Lordships' decision in *Mason* v. *Provident Clothing and Supply Co.* (1) The appeal therefore fails.

LORD SUMNER. My Lords, I have had the advantage of reading and considering the judgment of my noble and learned friend which I have just read to your Lordships and I entirely agree with it.

LORD SHAW OF DUNFERMLINE. (2) My Lords, the facts of this case have been stated with such clearness and completeness in the

(1) [1913] A. C. 724. (2) Read by Lord Atkinson.

speeches to which your Lordships have just listened, that I do not again resume them.

I am humbly of opinion that the judgments of Sargant J. and—in the Court of Appeal—of Lord Cozens-Hardy M.R. and Joyce J. are well founded both upon authority and in principle. So satisfied, indeed, is my mind with these judgments that I should feel well content with a simple concurrence therein. But the dissent of Phillimore L.J. and the heavy assault delivered upon certain opinions recently delivered—notably in *Mason* v. *Provident Clothing Co.* (1)—and upon certain principles laid down, or rather reaffirmed, in that and the *Adelaide Steamship Case* (2)—which principles I thought and still think to be familiar and sound—these things induce me to make the following statement.

I humbly think that this case is covered by the authority of *Mason.* (1) The circumstances were not remotely analogous, and the principles in issue were the same. It binds this House, and I see no cause whatsoever for looking upon it as not satisfactory to the reason. All that was argued upon it was to the effect that certain observations made in the course of the judgments were merely dicta and were erroneous. These observations were two in number, and they went to the root of the judgment.

Nor were they erroneous. The first was that there does run through this part of the law a real distinction between cases of contracts for the sale of a business on the one hand, and, on the other, cases of contracts of service.

My Lords, I do not repeat what I ventured to say to this House on that subject in *Mason's Case.* (1) When a business is sold, the vendor, who, it may be, has inherited it or built it up, seeks to realize this piece of property, and obtains a purchaser upon a condition without which the whole transaction would be valueless. He sells, he himself agreeing not to compete; and the law upholds such a bargain, and declines to permit a vendor to derogate from his own grant. Public interest cannot be invoked to render such a bargain nugatory: to do so would be to use public interest for the destruction of property. Nothing could be a more sure deterrent to commercial energy and activity than a principle that its

(1) [1913] A. C. 724. (2) [1913] A. C. 781.

H. L. (E.) 1916

HERBERT MORRIS, LIMITED v. SAXELBY.

Lord Shaw of Dunfermline.

accumulated results could not be transferred save under conditions which would make its buyer insecure.

In the case of restraints upon the opportunity to a workman to earn his livelihood a different set of considerations comes into play. No actual thing is sold or handed over by a present to a future possessor. The contract is an embargo upon the energy and activities and labour of a citizen; and the public interest coincides with his own in preventing him, on the one hand, from being deprived of the opportunity of earning his living, and in preventing the public, on the other, from being deprived of the work and service of a useful member of society. In this latter case there is not a something already realized, made over to and for the use of another; but there is a something to be created, developed, and rendered to the individual advantage of the worker and to the use of the community at large. It is much too late in the day to attempt an attack upon a principle of distinction so plain.

The other observation in *Mason* (1) which was challenged was that applicable to agreements in restraint of the action of employees who left one service for another, or set up in business for themselves. Trade secrets, the names of customers, all such things which in sound philosophical language are denominated objective knowledge—these may not be given away by a servant; they are his master's property, and there is no rule of public interest which prevents a transfer of them against the master's will being restrained. On the other hand, a man's aptitudes, his skill, his dexterity, his manual or mental ability—all those things which in sound philosophical language are not objective, but subjective—they may and they ought not to be relinquished by a servant; they are not his master's property; they are his own property; they are himself. There is no public interest which compels the rendering of those things dormant or sterile or unavailing; on the contrary, the right to use and to expand his powers is advantageous to every citizen, and may be highly so for the country at large. This distinction, which was also questioned in argument, is just as plain as the other.

An excellent concrete example of the latter point may be found in the present case. The second head of the injunction claimed is "from divulging or communicating . . . . information as to

(1) [1913] A. C. 724.

the customers or affairs of the plaintiff company and from otherwise divulging or using such information." This is purely objective, and it was with exact correctness made the subject of a separate claim. As it turns out there is no ground for it in fact; it was entirely given up at your Lordships' bar.

But the subjective side appears in this way. The first injunction claimed is an injunction restraining W. Saxelby for a period of seven years from entering the service of Messrs. Vaughan & Sons, and from carrying on in the United Kingdom "either as principal, agent, servant or otherwise, alone or jointly or in connection with any other person, firm, or company, or being concerned or assisting directly or indirectly, whether for reward or otherwise, in the sale or manufacture of" four or five pieces of machinery named. This echoes correctly the agreement of the parties, and the basis of the restraint claimed is that the servant has become, during the seven years passed in the master's service, a clever, well-instructed, and capable man.

My Lords, the question is, can such a voluntary restraint be enforced by law? Observe its scope. In time, it is for seven years of a man's working life. In space, it is over the entire United Kingdom. In subject-matter, it is directly or indirectly and it is wholly, for that time and in that space, subversive of the way of life to which the servant's past special training has led up.

This question is legitimate, and it is legitimately so put. For in my view, my Lords, when such an agreed restraint is made the basis of a claim for injunction, (1.) it is not enough to table the agreement; (2.) facts and circumstances must be set forth which would warrant the law being invoked, and the statement of these facts and circumstances must set out the specialties affecting the relations of parties, or the particular necessities of the case, so as to overcome the presumption which the law makes in favour of the free disposal of one's own labour; (3.) if such facts and circumstances be relevantly set forth, the onus of proof is upon the party averring them to satisfy the Court of their sufficiency to overcome the presumption; while (4.) as the time of restriction lengthens, or the space of its operation extends, the weight of that onus grows. Subject to these conditions and within these limits, a case may be made out for restraining that general freedom of trade to which

H. L. (E.) 1916

HERBERT MORRIS, LIMITED v. SAXELBY.

Lord Shaw of Dunfermline.

the public interest leans, in favour of the particular freedom of contract which it may be established it was not inconsistent with the general interest to maintain.

Furthermore, my Lords, I may be allowed to allude to what I think is a misapprehension upon this topic of the public interest, and the interest of the contracting parties. It is too apt to be supposed that these things are in collision or antagonism; and ground is thought to be obtained for this opinion in the well-known sentences of Lord Macnaghten in the *Nordenfelt Case*. (1) It is because the law is the protector of freedom both of contract and of trade that it has to adjust the bounds of each. It is well settled that the law will not sustain a covenant of the kind here in question when its provisions go beyond those necessary for the protection of the interest of the covenantee. The interest of the covenantor has also to be considered, and Lord Macnaghten's words specifically referred to the interest of both parties. But the interest of the covenantor entirely equates, in kind although not in degree, with the interest of the public; and he can only be successful in pleading his own interest if he is able to establish that the restraint upon him is of a kind and type which, if general, would be injurious to society at large. It is thus that the apparent conflict is reconciled, and an adjustment of all the interests concerned is secured.

The delicacy of the operation of law in settling the bounds of either freedom has been long familiar. In these cases, as I have pointed out, there are two freedoms to be considered—one the freedom of trade and the other the freedom of contract; and to that I will now again venture to add that it is a mistake to think that public interest is only concerned with one; it is concerned with both. It may be, and probably is, that jurisprudence has reflected the evolution of economic thought by accentuating at one period freedom of trade, and at another freedom of contract; but the stage of balance and reconciliation which has now been definitely reached is, it may be observed, in truth a reversion to, and a restatement of, the perennial problem set forth in the penetrating judgment of Lord Macclesfield in *Mitchel* v. *Reynolds* (2), in which, speaking more than two centuries ago, he says: "The revelations of the books upon these contracts seeming to disagree, I will

(1) [1894] A. C. 535. (2) 1 P. Wms. 181, 189.

endeavour to state the law upon this head, and to reconcile the jarring opinions."

My Lords, in my opinion *Mitchel* v. *Reynolds* (1) still remains, among all the decisions, the most outstanding and helpful authority. Lord Macclesfield states the principle in a form which seems to fit and rule many very modern conditions, and many developments of commerce and of contract: "The true reasons of the distinction upon which the judgments in these cases of voluntary restraints are founded, are, 1st, the mischief which may arise from them, 1st to the party, by the loss of his livelihood, and the subsistence of his family; 2ndly, to the public by depriving it of an useful member.

"Another reason is, the great abuses these voluntary restraints are liable to; as for instance, from corporations, who are perpetually labouring for exclusive advantages in trade, and to reduce it into as few hands as possible; as likewise from masters, who are apt to give their apprentices much vexation on this account, and to use many indirect practices to procure such bonds from them, lest they should prejudice them in their custom, when they come to set up for themselves."

These principles, my Lords, are far-reaching and enlightened. In my opinion they may have been now and again in the course of these two centuries obscured; they have never been lost.

When they are applied in the present instance, the case is simplicity itself. It is admitted that on the objective side nothing has been done amiss. I do not see that there were any trade secrets; if there were any, they have not been given away. It is not suggested that they will be, and this is the case also with information about customers, &c.; in fact, the whole of that claim for injunction has been abandoned. As to what remains, namely, the claim against Mr. Saxelby setting up or assisting in a business which does the special engineering work in which he was trained, this is rested upon the likelihood that his own abilities, skill, and knowledge would be of advantage to himself or others as competitors in manufacture and trade. So rested, it is an audacious claim, whether regarded from the point of view of the parties or of the public.

From the point of view of the appellants it is, plainly put, a claim against competition per se, a claim to cripple rivals in trade by the

(1) 1 P. Wms. 181, 190.

H. L. (E.) 1916

HERBERT MORRIS, LIMITED v. SAXELBY.

Lord Shaw of Dunfermline.

denial to them of a supply of all skilled labour which has had the advantage of being performed under the appellants, and accordingly pro tanto to compel them to seek for labour in a foreign market.

From the point of view of the respondent it is, justly interpreted, a claim to put him in such a bondage in regard to his own labour that, if he seek to find employment or advancement elsewhere, he must, for seven years of his life, become an exile.

From the point of view of the public one would have thought that it was at least not inconsistent with the public interest to "let knowledge grow from more to more." And under modern conditions, both of society and of trade, it would appear to be in accord with the public interest to open and not to shut the markets of these islands to the skilled labour and the commercial and industrial abilities of its inhabitants, to further and not to obstruct for these *les carrières ouvertes*. All such considerations are shut down under an appeal to enforce this restraint, and I am humbly of opinion that its enforcement cannot be compelled by law.

I agree that the appeal should be dismissed.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, February 8, 1916.

Solicitors for appellants: *Ward, Perks & Terry.*
Solicitors for respondent: *Pettiver & Pearkes.*

[PRIVY COUNCIL.]

BRITISH COLUMBIA ELECTRIC RAILWAY COMPANY, LIMITED . . . . . } APPELLANTS;

AND

LOACH. . . . . RESPONDENT.

J. C.*
1915
July 26.

ON APPEAL FROM THE COURT OF APPEAL OF BRITISH COLUMBIA.

Negligence—Contributory Negligence—Continuing Negligence of Defendant —Cause of Injury.

The principle that the contributory negligence of a plaintiff will not disentitle him to recover damages if the defendant, by the exercise of care, might have avoided the result of that negligence, applies where the defendant, although not committing any negligent act subsequently to the plaintiff's negligence, has incapacitated himself by his previous negligence from exercising such care as would have avoided the result of the plaintiff's negligence.

Judgment of Anglin J. in *Brenner* v. *Toronto Ry. Co.* (1907) 13 Ont. L. R. 423 approved.

APPEAL from a judgment of the Court of Appeal of British Columbia (January 6, 1914) reversing the judgment of the judge at the trial with a jury.

The respondent, as administrator of the estate of Benjamin Sands, deceased, brought an action against the appellants under the Families Compensation Act (R. S. B. C., 1911, c. 82) to recover damages in respect of the death of the deceased, which he alleged to have been caused by the negligence of the appellants. The above-mentioned Act is in substantially the same terms as the Fatal Accidents Act, 1846 (9 & 10 Vict. c. 93 (Imp.)). The appellants denied the alleged negligence and pleaded, inter alia, that the death of Sands was caused by his contributory negligence.

The accident which gave rise to the action occurred while the deceased was being driven by another man in a wagon called a "rig." The highway along which the wagon was proceeding crossed the appellants' track on the level at a point near a station

* *Present:* VISCOUNT HALDANE, LORD PARKER OF WADDINGTON, and LORD SUMNER.

J. C.
1915
BRITISH COLUMBIA ELECTRIC RAILWAY COMPANY, LIMITED
v.
LOACH.

and an orchard. While the wagon was being driven across the track it was run into by an electric car belonging to the appellants, with the result that the deceased was killed.

The following were the questions left to the jury by Murphy J. at the trial and the answers thereto :—

1. Was the defendant company guilty of negligence which was the proximate cause of the accident ?—A. Yes.

2. If so, in what did such negligence consist ?—A. Excessive speed under the circumstances: namely, a single track was in use for both-way passengers, and it was proved that passengers were waiting whose destination was unknown to the motorman or conductor. Therefore, the speed should have been slackened and the car brought under complete control approaching the station. Insufficient space between the orchard and station for observing approach of cars from the north.

3. Was the deceased, as distinguished from the driver of the rig, guilty of negligence which contributed to the accident ?—A. Yes.

4. If so, in what did such negligence consist ?—A. By not taking extraordinary precautions to see the road was clear.

5 and 6. If both the company and the deceased were guilty of negligence, could the company then have done anything which would have prevented the accident ? If so, what ? Answer fully. —A. Yes, the motorman could have stopped the car if the brake had been in effective condition.

[Questions 7 to 10 were as to whether the driver of the rig, as distinguished from the deceased, had been negligent and whether the appellants could have avoided the result of that negligence. The jury answered as in reply to questions 3 to 6.]

11. (*a*) Damages for widow ? —A. 5000 dollars. (*b*) Damages for each child ?—A. 2500 dollars.

After argument the learned judge gave judgment for the appellants on the ground that, the jury having found that both the defendants and the deceased had been negligent, there was no evidence of any further negligence on the part of the defendants.

Upon appeal the Court of Appeal by a majority (Irving, Martin, and Galliher JJ.A., Macdonald C.J.A. and McPhillips J.A. dissenting) reversed the above decision and gave judgment for the plaintiff for the amounts found by the jury.

1915. July 6. *Dickens*, *K.C.*, and *T. T. Paine*, for the appellants. Upon the facts proved at the trial the appellants were entitled to judgment. There was no evidence of any negligence or want of care upon the part of the appellants subsequent to the negligence of the deceased. The jury found that there was contributory negligence on the part of the deceased; that negligence was the proximate cause of the accident. Even if the appellants' negligence is to be regarded as continuing, that of the deceased was of the same character, and having regard to the third finding he is not entitled to recover. [*Canadian Pacific Ry. Co.* v. *Fréchette* (1), *Reynolds* v. *Tilling* (2), and *Radley* v. *London and North Western Ry. Co.* (3) were referred to.]

D. G. Macdonell, for the respondent, was not called upon.

July 26. The judgment of their Lordships was delivered by

LORD SUMNER. This is an appeal from a judgment of the Court of Appeal of British Columbia in favour of the administrator of the estate of Benjamin Sands, who was run down at a level crossing by a car of the appellant railway company and was killed. One Hall took Sands with him in a cart, and they drove together on to the level crossing, and neither heard nor saw the approaching car till they were close to the rails and the car was nearly on them. There was plenty of light and there was no other traffic about. The verdict, though rather curiously expressed, clearly finds Sands guilty of negligence in not looking out to see that the road was clear. It was not suggested in argument that he was not under a duty to exercise reasonable care, or that there was not evidence for the jury that he had disregarded it. Hall, who escaped, said that they went "right on to the track," when he heard Sands, who was sitting on his left, say "Oh," and looking up saw the car about fifty yards off. He says he could then do nothing, and with a loaded wagon and horses going two to three miles an hour he probably could not. It does not seem to have been suggested that Sands could have done any good by trying to jump off the cart and clear the rails. The car knocked cart, horses, and men over, and ran some distance beyond the crossing before it

(1) [1915] A. C. 871. (2) (1903) 19 Times L. R. 539.
(3) (1876) 1 App. Cas. 754.

J. C.
1915
BRITISH COLUMBIA ELECTRIC RAILWAY COMPANY, LIMITED
v.
LOACH.

could be stopped. It approached the crossing at from thirty-five to forty-five miles an hour. The driver saw the horses as they came into view from behind a shed at the crossing of the road and the railway, when they would be ten or twelve feet from the nearest rail, and he at once applied his brake. He was then 400 feet from the crossing. If the brake had been in good order it should have stopped the car in 300 feet. Apart from the fact that the car did not stop in time, but overran the crossing, there was evidence for the jury that the brake was defective and inefficient and that the car had come out in the morning with the brake in that condition. The jury found that the car was approaching at an excessive speed and should have been brought under complete control, and although they gave as their reason for saying so the presence of possible passengers at the station by the crossing, and not the possibility of vehicles being on the road, there can be no mistake in the matter, and their finding stands. It cannot be restricted, as the trial judge and the appellants sought to restrict it, to a finding that the speed was excessive for an ill-braked car, but not for a properly-braked car, or to a finding that there was no negligence except the "original" negligence of sending the car out ill-equipped in the morning.

Clearly if the deceased had not got on to the line he would have suffered no harm, in spite of the excessive speed and the defective brake, and if he had kept his eyes about him he would have perceived the approach of the car and would have kept out of mischief. If the matter stopped there, his administrator's action must have failed, for he would certainly have been guilty of contributory negligence. He would have owed his death to his own fault, and whether his negligence was the sole cause or the cause jointly with the railway company's negligence would not have mattered.

It was for the jury to decide which portions of the evidence were true, and, under proper direction, to draw their own inferences of fact from such evidence as they accepted. No complaint was made against the summing-up, and there has been no attempt to argue before their Lordships that there was not evidence for the jury on all points. If the jury accepted the facts above stated, as certainly they well might do, there was no further negligence on the part of Sands after he looked up and saw the car, and then there

was nothing that he could do. There he was, in a position of extreme peril and by his own fault, but after that he was guilty of no fresh fault. The driver of the car, however, had seen the horses some perceptible time earlier, had duly applied his brakes, and if they had been effective he could, as the jury found, have pulled up in time. Indeed, he would have had 100 feet to spare. If the car was 150 feet off when Sands looked up and said "Oh," then each had the other in view for fifty feet before the car reached the point at which it should have stopped. It was the motorman's duty, on seeing the peril of Sands, to make a reasonable use of his brakes in order to avoid injuring him, although it was by his own negligence that Sands was in danger. Apparently he did his best as things then were, but partly the bad brake and partly the excessive speed, for both of which the appellants were responsible, prevented him from stopping, as he could otherwise have done. On these facts, which the jury were entitled to accept and appear to have accepted, only one conclusion is possible. What actually killed Sands was the negligence of the railway company, and not his own, though it was a close thing.

Some of the judges in the Courts below appear to have thought that because the equipment of the car with a defective brake was the original cause of the collision, and could not have been remedied after Sands got on the line, no account should be taken of it in considering the motorman's failure to avoid the collision after he knew that Sands was in danger. "You cannot charge up the same negligence under different heads," said Murphy J. at the trial; "you cannot charge it up twice." "On the question of ultimate negligence," he observed, "that negligence must arise on the conditions as existing at the time of the accident. It would, of course, be absurd to say the company had any opportunity between the time that this rig appeared upon the track and the collision to remedy any defect in the brake. If there was such a defect I think it was original negligence and not what may possibly be termed 'ultimate negligence.'"

In the Court of Appeal Macdonald C.J.A., delivering a dissentient judgment in favour of the present appellants, said: "Where one party negligently approaches a point of danger, and the other party, with like obligation to take care, negligently approaches the same

J. C. 1915

BRITISH COLUMBIA ELECTRIC RAILWAY COMPANY, LIMITED v. LOACH.

point of danger, if there arises a situation which could be saved by one and not by the other, and the former then negligently fail to use the means in his power to save it, and injury is caused to the latter, that failure is designated ultimate negligence, in the sense of being the proximate cause of the injury. In this case it is sought to carry forward, as it were, an anterior negligent omission of the defendants, though continuing, it is true, up to the time of the occurrence, and to assign to it the whole blame for the occurrence, although by no effort of the defendants or their servants could the situation at that stage have been saved."

So, too, McPhillips J.A., also dissenting, said: "Upon the evidence, whether it was because of defective brakes or any of the acts of negligence found against the defendants, none of them were acts of negligence arising after the act of contributory negligence of the deceased, and cannot be held to be acts of negligence which, notwithstanding the later negligence of the deceased, warrant judgment going for the plaintiff. . . . . The motorman after he saw the vehicle could not have stopped the car . . . . therefore, as nothing could be then done by the motorman to remedy the ineffective brake, the want of care of the deceased was the direct and effective contributory cause of the accident resulting in his death."

These considerations were again urged at their Lordships' bar under somewhat different forms. It was said (1.) that the negligence relied on as an answer to contributory negligence must be a new negligence, the initial negligence which founded the cause of action being spent and disposed of by the contributory negligence. Further, it was said (2.) that if the defendants' negligence continued up to the moment of the collision, so did the deceased's contributory negligence, and that this series, so to speak, of replications and rebutters finally merged in the accident without the deceased ever having been freed from the legal consequence of his own negligence having contributed to it.

The last point fails because it does not correspond with the fact. The consequences of the deceased's contributory negligence continued, it is true, but, after he had looked, there was no more negligence, for there was nothing to be done, and, as it is put in the classic judgment in *Tuff* v. *Warman* (1), his contributory negligence will

(1) (1858) 5 C. B. (N.S.) 573, 585.

not disentitle him to recover "if the defendant might by the exercise of care on his part have avoided the consequences of the neglect or carelessness of the plaintiff."

As to the former point, there seems to be some ambiguity in the statement. It may be convenient to use a phraseology which has been current for some time in the Canadian Courts, especially in Ontario, though it is not precise. The negligence which the plaintiff proves to launch his case is called "primary" or "original" negligence. The defendant may answer that by proving against the plaintiff "contributory negligence." If the defendant fails to avoid the consequences of that contributory negligence, and so brings about the injury, which he could and ought to have avoided, this is called "ultimate" or "resultant" negligence. The opinion has been several times expressed, in various forms, that "original" negligence and "ultimate" negligence are mutually exclusive, and that conduct which has once been relied on to prove the first cannot in any shape constitute proof of the second.

Here lies the ambiguity. If the "primary" negligent act is done and over, if it is separated from the injury by the intervention of the plaintiff's own negligence, then no doubt it is not the "ultimate" negligence in the sense of directly causing the injury. If, however, the same conduct which constituted the primary negligence is repeated or continued, and is the reason why the defendant does not avoid the consequences of the plaintiff's negligence at and after the time when the duty to do so arises, why should it not be also the "ultimate" negligence which makes the defendant liable?

This matter was much discussed in *Brenner* v. *Toronto Ry. Co.* (1), when Anglin J. delivered a very valuable judgment in the Divisional Court. The decision of the Divisional Court was reversed on appeal (2), but on other grounds, and in their comments on the decision of the Divisional Court, Duff J., in the Supreme Court, and also Chancellor Boyd in *Rice* v. *Toronto Ry. Co.* (3), and Hunter C.J. in *Snow* v. *Crow's Nest Pass Coal Co.* (4), seem to have missed the point to which Anglin J. had specially addressed himself.

(1) 13 Ont. L. R. 423.
(2) (1907) 15 Ont. L. R. 195; (1908) 40 Can. S. C. R. 540.
(3) (1910) 22 Ont. L. R. 446, 450.
(4) (1907) 13 B. C. Rep. 145, 155.

J. C.
1915
BRITISH COLUMBIA ELECTRIC RAILWAY COMPANY, LIMITED
v.
LOACH.

The facts of that case were closely similar to those in the present appeal, and it was much relied on in argument in the Court below. Anglin J., following the decision in *Scott* v. *Dublin and Wicklow Ry. Co.* (1), observed as follows (2): "Again, the duty of the defendants to the plaintiff, breach of which would constitute 'ultimate' negligence, only arose when her danger was or should have been apparent. Prior to that moment there was an abstract obligation incumbent upon them to have their car equipped with efficient emergency appliances ready and in condition to meet the requirements of such an occasion. Had an occasion for the use of emergency appliances not arisen, failure to fulfil that obligation would have given rise to no cause of action. Upon the emergency arising, that abstract obligation became a concrete duty owing to the plaintiff to avoid the consequences of her negligence by the exercise of ordinary care. . . . . Up to that moment there was no such breach of duty to the plaintiff. In that sense the failure of the defendants to avoid the mischief, though the result of an antecedent want of care, was negligence which occurred, in the sense of becoming operative, immediately after the duty, in the breach of which it consisted, arose. It effectively intervened between the negligence of the plaintiff and the happening of the casualty. But there is a class of cases where a situation of imminent peril has been created, either by the joint negligence of both plaintiff and defendant, or, it may be, by that of the plaintiff alone, in which, after the danger is or should be apparent, there is a period of time, of some perceptible duration, during which both or either may endeavour to avert the impending catastrophe. . . . . If, notwithstanding the difficulties of the situation, efforts to avoid injury duly made would have been successful, but for some self-created incapacity which rendered such efforts inefficacious, the negligence that produced such a state of disability is not merely part of the inducing causes—a remote cause or a cause merely sine qua non—it is, in very truth, the efficient, the proximate, the decisive cause of the incapacity, and therefore of the mischief. . . . . Negligence of a defendant incapacitating him from taking due care to avoid the consequences of the plaintiff's negligence, may, in some cases, though anterior in point of time to the plaintiff's negligence,

(1) (1861) 11 Ir. C. L. Rep. 377, 394. (2) 13 Ont. L. R. 437, 439, 440.

constitute 'ultimate' negligence, rendering the defendant liable notwithstanding a finding of contributory negligence of the plaintiff. . . . ."

Their Lordships are of opinion that, on the facts of the present case, the above observations apply and are correct. Were it otherwise the defendant company would be in a better position, when they had supplied a bad brake but a good motorman, than when the motorman was careless but the brake efficient. If the superintendent engineer sent out the car in the morning with a defective brake, which, on seeing Sands, the motorman strove to apply, they would not be liable, but if the motorman failed to apply the brake, which, if applied, would have averted the accident, they would be liable.

The whole law of negligence in accident cases is now very well settled, and, beyond the difficulty of explaining it to a jury in terms of the decided cases, its application is plain enough. Many persons are apt to think that, in a case of contributory negligence like the present, the injured man deserved to be hurt, but the question is not one of desert or the lack of it, but of the cause legally responsible for the injury. However, when once the steps are followed the jury can see what they have to do, for the good sense of the rules is apparent. The inquiry is a judicial inquiry. It does not always follow the historical method and begin at the beginning. Very often it is more convenient to begin at the end, that is at the accident, and work back along the line of events which led up to it. The object of the inquiry is to fix upon some wrong-doer the responsibility for the wrongful act which has caused the damage. It is in search not merely of a causal agency but of the responsible agent. When that has been done, it is not necessary to pursue the matter into its origins; for judicial purposes they are remote. Till that has been done there may be a considerable sequence of physical events, and even of acts of responsible human beings, between the damage done and the conduct which is tortious and is its cause. It is surprising how many epithets eminent judges have applied to the cause, which has to be ascertained for this judicial purpose of determining liability, and how many more to other acts and incidents, which for this purpose are not the cause at all. "Efficient or effective cause," "real cause," "proximate cause," "direct

J. C.
1915
BRITISH COLUMBIA ELECTRIC RAILWAY COMPANY, LIMITED v. LOACH.

cause," "decisive cause," "immediate cause," "causa causans," on the one hand, as against, on the other, "causa sine qua non," "occasional cause," "remote cause," "contributory cause," "inducing cause," "condition," and so on. No doubt in the particular cases in which they occur they were thought to be useful or they would not have been used, but the repetition of terms without examination in other cases has often led to confusion, and it might be better, after pointing out that the inquiry is an investigation into responsibility, to be content with speaking of the cause of the injury simply and without qualification.

In the present case their Lordships are clearly of opinion that, under proper direction, it was for the jury to find the facts and to determine the responsibility, and that upon the answers which they returned, reasonably construed, the responsibility for the accident was upon the appellants solely, because, whether Sands got in the way of the car with or without negligence on his part, the appellants could and ought to have avoided the consequences of that negligence, and failed to do so, not by any combination of negligence on the part of Sands with their own, but solely by the negligence of their servants in sending out the car with a brake whose inefficiency operated to cause the collision at the last moment, and in running the car at an excessive speed, which required a perfectly efficient brake to arrest it. Their Lordships will accordingly humbly advise His Majesty that the appeal should be dismissed with costs.

Solicitors for appellants: *Linklater, Addison & Brown.*
Solicitors for respondent: *Blake & Redden.*

END OF VOL. I.

The Mode of Citation of the Volumes of the *Law Reports* commencing January 1, 1916, will be as follows:—

In the First Series,
[1916] 1 Ch. [1916] 2 Ch.

In the Second Series,
[1916] 1 K. B. [1916] 2 K. B. [1916] P.

In the Third Series,
[1916] 1 A. C. [1916] 2 A. C.

INDEX.

ACTION—Public authorities' protection—Limitation of time for bringing action—Action of negligence—Statutory duty or authority—Private obligation - 242
See LIMITATIONS, STATUTES OF. 2.

AFRICA—South Africa—Laws of - - 167
See SOUTH AFRICA.

ALIEN ENEMY—*Habeas Corpus—Internment—Nationality—German-born Subject—Loss of German Nationality by Residence Abroad.*

A German-born resident left his country in 1898 and had remained abroad ever since. After residing uninterruptedly for fifteen years in England, where he carried on business, he, being then aged thirty-two, was interned in a war camp as an alien enemy, whereupon he moved for a writ of habeas corpus.

By the North German Nationality Law of June 1, 1870, as extended by a statute of 1873 to the whole German Empire, Germans who remained abroad for an uninterrupted period of ten years thereby lost their nationality. By a German military statute of 1874 Germans who had lost their nationality and had not acquired any other were bound, on returning to Germany in order to take up their permanent residence there, to present themselves for military service, provided that they were not bound to serve in time of peace after the completion of their thirty-first year:—

Held, that the applicant had not so completely lost his German nationality that he could be treated for the purposes of the application as having ceased to be a German citizen, and that the application failed.

Whether the Courts of this country will recognize a person as having no nationality, *quaere.*

Order of the Court of Appeal [1916] 1 K. B. 280, n., affirmed. *Ex parte* WEBER
H. L. (E.) 421

APPEAL—Privy Council Appeals.
See PRIVY COUNCIL APPEALS.

ARBITRATION—*Sale of Goods—Dispute arising out of the Contract—Custom affecting Rights and Liabilities under the Contract—Jurisdiction of Arbitrator to determine Existence of Custom.*

Under a clause in a contract referring to arbitration any dispute arising under the contract it is competent to the arbitrator finally to determine the existence of a custom affecting the rights and obligations of the parties under the contract, where such custom is not inconsistent with the terms of the contract.

Hutcheson & Co. v. *Eaton & Son* (1884) 13 Q. B. D. 861 and *In re North Western Rubber Co. and Hüttenbach & Co.* [1908] 2 K. B. 907 overruled.

Decision of the Court of Appeal 84 L. J. (K. B.) 1153 (given solely on the authority of the above-named cases and without approving them) reversed. PRODUCE BROKERS CO. *v.* OLYMPIA OIL AND CAKE CO. - H. L. (E.) 314

ASSIGNABILITY — Africa — South Africa — Roman-Dutch law—Servitude—Right to trade upon lands—Assignability—Purchaser with notice - - 167
See SOUTH AFRICA.

AUSTRALIA—NEW SOUTH WALES—*Street Improvements—Betterment Charge—Liability of Crown—Purchasers from Crown—Construction of Statute—Moore Street Improvement Act*, 1890 (*N. S. W.* 54 *Vict. No.* 30), *ss.* 4, 5, *and* 6.

The Moore Street Improvement Act, 1890 (N. S. W. 54 Vict. No. 30), authorized the respondents to carry out certain street improvements in the city of Sydney. The Act provided that a fixed proportion of the cost should be raised by contributions (hereinafter called the betterment charge) assessed upon the owners of property within the improvement area liable to the city rate, and that the balance of the cost should be imposed upon the whole rateable property of the city. The charge in each case was spread over a period of one hundred years. By the Sydney Corporation Act, 1879 (N. S. W. 43 Vict. No. 3), ss. 3 and 103, the Crown, which was not named in the Act of 1890, was liable to

AUSTRALIA—*continued.*
pay the city rate on buildings but not on land which was not built upon. At the passing of the Act of 1890, and the assessment thereunder, the Crown owned within the improvement area certain land upon which there were no buildings. Subsequently the Crown divided the land into lots which it sold to the appellants respectively, and buildings were erected thereon :—

Held, that the Act of 1890 imposed no liability upon the Crown to contribute to the betterment charge in respect of the vacant land, and that the appellants did not become so liable by reason of their purchase of the lots, or the erection of buildings thereon. BANK OF AUSTRALASIA AND OTHERS *v.* SYDNEY MUNICIPAL COUNCIL - - - - - - **J. C. 181**

—— Insurance (Marine).
See INSURANCE (MARINE).

BANKRUPTCY—*Salary of Member of Parliament—Appropriation for Benefit of Creditors—Bankruptcy (Ireland) Amendment Act*, 1872 (35 & 36 *Vict. c.* 58), *s.* 51.

The annual payment of 400*l.* to members of Parliament under the resolution of the House of Commons of August 10, 1911, is "salary or income" within s. 51 of the Bankruptcy (Ireland) Amendment Act, 1872, and, therefore, where a bankrupt is a member of Parliament, the Court may make an order appropriating a portion of his salary for the benefit of his creditors.

Order of the Court of Appeal in Ireland [1915] 2 I. R 425 reversed. HOLLINSHEAD *v.* HAZLETON - - - - - **H. L. (I.) 428**

BILLS OF LADING—Prize Court — Cargo and pledgees — Consignees under bills of lading—Ownership—Bounty of Crown —Power unimpaired by Civil List Acts
See PRIZE COURT. 1. **145**

BREACH—Landlord and tenant—Covenant to repair — Notice of breach — Specification of particular breaches—Addition to general clause—Sufficiency of notice - - - - - - - **1**
See LANDLORD AND TENANT.

BRITISH COLUMBIA—Appeal from - **719**
See NEGLIGENCE.

BURMA—Lower Burma—Laws of - - **175**
See CONTRACT.

CANADA—*Legislative Authority of Dominion—Insurance — "Regulation of trade and commerce"—Insurance Act*, 1910 (9 & 10 *Edw.* 7, *c.* 32, *Canada*), *ss.* 4, 70—*British North America Act*, 1867 (30 & 31 *Vict. c.* 3), *ss.* 91, 92.

By s. 4 of the Insurance Act, 1910, enacted by the Parliament of Canada, "In Canada, except as otherwise provided by this Act, no company or underwriters or other person shall solicit or accept any risk, or issue or deliver any receipt or policy of insurance, or grant any annuity on a life or lives, or collect or receive any premium, or inspect any risk, or adjust any loss, or carry on any business of insurance, or prosecute or maintain any suit, action or proceeding, or file any claim in insolvency relating to such business, unless it be done by or on behalf of a company or underwriters holding a licence from the Minister." Sect. 70 provided that any contravention of s. 4 should be punishable for a first offence by fine, and for a second or subsequent offence by imprisonment with hard labour :—

Held, that the above legislation was ultra vires of the Parliament of Canada, since the authority conferred by the British North America Act, 1867, s. 91, head (2.), to legislate as to "the regulation of trade and commerce" does not extend to the regulation by a licensing system of a particular trade in which Canadians would otherwise be free to engage in the provinces, and since it could not be enacted under the general power conferred by s. 91 to legislate for the peace, order, and good government of Canada, as it trenched upon the legislative authority conferred on the provinces by s. 92, head (13.), to make laws as to "civil rights in the province."

The principle illustrated by *Russell* v. *The Queen* (1882) 7 App. Cas. 829, that subjects which in one aspect come within the authority of the provincial Legislatures may in another aspect fall within the authority of the Dominion Legislature, is well established, but ought to be applied with great caution.

Held, further, that it would be competent to the Parliament of Canada, under s. 91, heads (2.) and (25.), by properly framed legislation, to prohibit an insurance company incorporated by a foreign State from carrying on business in Canada, if the company did not hold a licence from the Minister, even if the business carried on was confined to a single province. ATTORNEY-GENERAL FOR CANADA *v.* ATTORNEY-GENERAL FOR ALBERTA - - - - - **J. C. 588**

2. —— *Legislative Authority of Dominion—Legislative Authority of Provinces—Incorporation of Companies—Powers and Capacity—Insurance—British North America Act*, 1867 (30 & 31 *Vict. c.* 3), *ss.* 91, 92.

Questions referred to the Supreme Court of Canada as to the power and capacity of companies incorporated under provincial legislative authority and as to the power of the provincial Legislatures to restrict the operations of companies incorporated under Dominion legislative authority answered by reference to the judgments of the Board in *John Deere Plow Co.* v. *Wharton* [1915] A. C. 330; *Bonanza Creek Gold Mining Co.* v. *Rex* [1916] A. C. 566; and *Attorney-General for Canada* v. *Attorney-General for Alberta* [1916] A. C. 588. ATTORNEY-GENERAL FOR ONTARIO *v.* ATTORNEY-GENERAL FOR CANADA - - - **J. C. 598**

3. —— *Legislative Authority of Province—Incorporation of Companies—"With provincial objects" — Capacity outside Province — Letters Patent—Prerogative Power—Yukon Territory—Free Miner's Certificate—"Canadian Charter"—British North America Act*, 1867 (30 & 31 *Vict. c.* 3), *ss.* 12, 46, 91, 92—*Ontario Companies Act* (*R. S. Ont.*, 1897, *c.* 191), *s.* 9,

CANADA—*continued.*

Sect. 92 of the British North America Act, 1867, confines the actual powers and rights which a provincial Government can bestow upon a company, either by legislation or through the Executive, to powers and rights exercisable within the province, but does not preclude a province either from keeping alive the then existing power of the Executive to incorporate by charter so as to confer a general capacity analogous to that of a natural person, or to legislate so as to create, by or by virtue of a statute, a corporation with this general capacity. The power of incorporation by charter transferred to the Lieutenant-Governor of the province of Ontario by s. 65 of the above mentioned Act has not been abrogated or interfered with by the Ontario Companies Act (R. S. Ont., 1897, c. 191).

The doctrine of *Ashbury Railway Carriage and Iron Co.* v. *Riche* (1875) L. R. 7 H. L. 653 does not apply to a company which derives its existence from the act of the Sovereign and not merely from the regulating statute :—

Held, therefore, that a company incorporated by letters patent issued by the Lieutenant-Governor of Ontario under the Ontario Companies Act (R. S. Ont., 1897, c. 191), s. 9, with the object of carrying on the business of mining, has a status and capacity which enable it to accept and exercise mining leases and rights in the Yukon Territory conferred by the authorities of the Dominion and the Yukon Territory.

Held, further, that a company incorporated under the Ontario Companies Act is "incorporated under a Canadian charter" within the meaning of the regulations governing the issue of a free miner's certificate in the Yukon Territory. BONANZA CREEK GOLD MINING CO. *v.* REX - - - - - - - J. C. 566

4. —— *Ontario—Assessment — School Rates —Municipal By-law—Exemption — Confirming Statute—Construction of Statute—Public Schools Act*, 1892 (55 *Vict. c.* 60, *Ontario*), *s.* 4.

By the Public Schools Act, 1892 (Ontario), s. 4, "No municipal by-law hereafter passed for exempting any portion of the rateable property of a municipality from taxation, in whole or in part, shall be held or construed to exempt such property from school rates of any kind whatsoever." In 1904 the respondents passed a by-law fixing the assessment of the appellants' property at 100,000 dollars for the next twenty years. This by-law required statutory confirmation, since it had not received the assent of two-thirds of the voters, as provided by the Consolidated Municipal Act, 1903, s. 591a. By an Act of the Ontario Legislature the by-law was "declared to be legal, valid and binding notwithstanding anything in any Act to the contrary":—

Held, that the confirming Act gave statutory effect to the by-law subject to the construction imposed upon it by the Public Schools Act, 1892, and that the property could be assessed at over 100,000 dollars in respect of school rates. ONTARIO POWER CO. OF NIAGARA FALLS *v.* STAMFORD MUNICIPAL CORPORATION J. C. 529

CANADA—*continued.*

—— Ontario — Company—Directors—Contract —Exclusion of company — Breach of duty—Ratification by general meeting—Voting power of directors—Invalidity *See* COMPANY. 554

—— Ontario—Will—Election - - - 266 *See* ELECTION.

—— Railway—Lands taken — Compensation—Severance — Impaired access — Noise, smoke, and vibration—Disjoined properties - - - - - - 536 *See* COMPENSATION. 1.

—— Saskatchewan—Specific performance - 275 *See* SPECIFIC PERFORMANCE.

CARGO AND PLEDGEES—Prize Court—Consignees under bills of lading—Ownership—Bounty of Crown—Power unimpaired by Civil List Acts - - 145 *See* PRIZE COURT. 1.

CARRIAGE OF GOODS—Condition in consignment note—Construction—Railway *See* RAILWAY. 189

CASES :—

—— *Ashbury Railway Carriage and Iron Co.* v. *Riche* (1875) L. R. 7 H. L. 653. Referred to. BONANZA CREEK GOLD MINING CO. *v.* REX J. C. [1916] A. C. 566

—— *Attorney-General for Canada* v. *Attorney-General for Alberta* [1916] A. C. 588. Referred to. ATTORNEY-GENERAL FOR ONTARIO *v.* ATTORNEY-GENERAL FOR CANADA - J. C. [1916] A. C. 598

—— *Barnes* v. *Nunnery Colliery Co.* [1912] A. C. 44. Applied. HERBERT *v.* FOX (SAMUEL) & Co. - H. L. (E.) [1916] A. C. 405

—— *Beal* v. *Horlock* - [1915] 3 K. B. 627 Reversed - H. L. (E.) [1916] A. C. 486

—— *Beale* v. *Thompson* - (1804) 4 East, 546 Distinguished. HORLOCK *v.* BEAL H. L. (E.) [1916] A. C. 486

—— *Beechgrove S.S. Co.* v. *Aktieselskabet Fjord of Kristiania*, 1915 S. C. 281. Reversed - H. L. (Sc.) [1916] A. C. 364

—— *Bonanza Creek Gold Mining Co.* v. *Rex* [1916] A. C. 566. Referred to. ATTORNEY-GENERAL FOR ONTARIO *v.* ATTORNEY-GENERAL FOR CANADA - J. C. [1916] A. C. 598

—— *Brenner* v. *Toronto Ry. Co.* (1907) 13 Ont. L. R. 423. Judgment of Anglin J. in, approved. BRITISH COLUMBIA ELECTRIC RY. CO. *v.* LOACH - J. C. [1916] A. C. 719

—— *Burland* v. *Earle* - [1902] A. C. 83 Distinguished. COOK *v.* DEEKS J. C. [1916] A. C. 554

CASES—*continued.*

—— *Charlton, The* - (1895) 8 Asp. M. L. C. 29
Overruled. BEECHGROVE S.S. Co. *v.* AKTIESELSKABET FJORD OF KRISTIANIA - **H. L. (Sc.)** [1916] **A. C. 364**

—— *Chertsey Union* v. *Metropolitan Water Board* (1914) 12 L. G. R. 1248.
Reversed - **H. L. (E.)** [1916] **A. C. 337**

—— *Clyde Navigation Co.* v. *Barclay* (1876) 1 App. Cas. 790.
Referred to. BEECHGROVE S.S. Co. *v.* AKTIESELSKABET FJORD OF KRISTIANIA - - - - - **H. L. (Sc.)** [1916] **A. C. 364, 383**

—— *Cowper Essex* v. *Acton Local Board* (1889) 14 App. Cas. 153.
Distinguished. HOLDITCH *v.* CANADIAN NORTHERN ONTARIO RY. CO. **J. C.** [1916] **A. C. 536**

—— *Delamainer* v. *Winteringham* (1815) 4 Camp. 186.
Referred to. HORLOCK *v.* BEAL **H. L. (E.)** [1916] **A. C. 486, 493**

—— *Dysart (Earl of)* v. *Hammerton & Co.* [1914] 1 Ch. 822.
Reversed - **H. L. (E.)** [1916] **A. C. 57**

—— *East London Railway Joint Committee* v. *Bermondsey Assessment Committee* [1913] 1 K. B. 612.
Distinguished. GREAT WESTERN AND METROPOLITAN RY. COS. *v.* KENSINGTON ASSESSMENT COMMITTEE **H. L. (E.)** [1916] **A. C. 23**

—— *Elderslie Steamship Co.* v. *Borthwick* [1905] A. C. 93, 96.
Judgment of Lord Macnaghten in, quoted. CHURM *v.* DALTON MAIN COLLIERIES, LD. - - **H. L. (E.)** [1916] **A. C. 612, 649**

—— *Flarty* v. *Odlum* - (1790) 3 T. R. 681
Referred to. HOLLINSHEAD *v.* HAZLETON - **H. L. (I.)** [1916] **A. C. 428, 441**

—— *General Steam Navigation Co.* v. *British and Colonial Steam Navigation Co.* (1869) L. R. 4 Ex. 238.
Overruled on one point. BEECHGROVE S.S. Co. *v.* AKTIESELSKABET FJORD OF KRISTIANIA - - **H. L. (Sc.)** [1916] **A. C. 364**

—— *Great Central Ry. Co.* v. *Banbury Union Assessment Committee* [1909] A. C. 78.
The principle of, applied. GREAT WESTERN AND METROPOLITAN RY. COS. *v.* KENSINGTON ASSESSMENT COMMITTEE - **H. L. (E.)** [1916] **A. C. 23**

—— *Hadley* v. *Clarke* - (1799) 8 T. R. 259
Distinguished. HORLOCK *v.* BEAL **H. L. (E.)** [1916] **A. C. 486**

—— *Halley, The* (1868) L. R. 2 P. C. 193, 201
Referred to. BEECHGROVE S.S. Co. *v.* AKTIESELSKABET FJORD OF KRISTIANIA - - - - **H. L. (Sc.)** [1916] **A. C. 364, 379**

CASES—*continued.*

—— *Hazleton, In re* - - [1915] 2 I. R. 425
Reversed sub nom. HOLLINSHEAD *v.* HAZLETON - - - - **H. L. (I.)** [1916] **A. C. 428**

—— *Herbert* v. *Samuel Fox & Co.* [1915] 2 K. B. 81.
Affirmed - - - - **H. L. (E.)** [1916] **A. C. 405**

—— *Higginson* v. *Blackwell Colliery Co.* (1915) 84 L. J. (K. B.) 1189.
Distinguished. CHURM *v.* DALTON MAIN COLLIERIES, LD. **H. L. (E.)** [1916] **A. C. 612, 646**

—— *Hooley* v. *Butterley Co.* (1915) 84 L. J. (K. B.) 1969, 1974.
Distinguished. CHURM *v.* DALTON MAIN COLLIERIES, LD. **H. L. (E.)** [1916] **A. C. 612, 646**

—— *Huggins, In re* - (1882) 21 Ch. D. 85
Referred to. HOLLINSHEAD *v.* HAZLETON - **H. L. (I.)** [1916] **A. C. 428, 446**

—— *Humfrey* v. *Dale* - (1857) 7 E. & B. 275
Statement of principle by Lord Campbell in, approved. PRODUCE BROKERS CO. *v.* OLYMPIA OIL AND CAKE CO. **H. L. (E.)** [1916] **A. C. 314**

—— *Hutcheson & Co.* v. *Eaton & Son* (1884) 13 Q. B. D. 861.
Overruled. PRODUCE BROKERS CO. *v.* OLYMPIA OIL AND CAKE CO. **H. L. (E.)** [1916] **A. C. 314**

—— *Hutton* v. *Warren* (1836) 1 M. & W. 466, 475.
Statement by Parke B. in, quoted. PRODUCE BROKERS CO. *v.* OLYMPIA OIL AND CAKE CO. **H. L. (E.)** [1916] **A. C. 314, 327**

—— *John Deere Plow Co.* v. *Wharton* [1915] A. C. 330.
Referred to. ATT.-GEN. FOR CANADA *v.* ATT.-GEN. FOR ALBERTA **J. C.** [1916] **A. C. 588, 597**

ATT.-GEN. FOR ONTARIO *v.* ATT.-GEN. FOR CANADA - **J. C.** [1916] **A. C. 598**

—— *Jolly* v. *Brown* - - [1914] 2 K. B. 109
Affirmed - **H. L. (E.)** [1916] **A. C. 1**

—— *Kilmer* v. *British Columbia Orchard Lands* [1913] A. C. 319.
Explained. STEEDMAN *v.* DRINKLE **J. C.** [1916] **A. C. 275**

—— *Lidderdale* v. *Duke of Montrose* (1791) 4 T. R. 248.
Referred to. HOLLINSHEAD *v.* HAZLETON - **H. L. (I.)** [1916] **A. C. 428, 441**

—— *Lion, The* - (1869) L. R. 2 P. C. 525, 532
Referred to. BEECHGROVE S.S. Co. *v.* AKTIESELSKABET FJORD OF KRISTIANIA - - - - **H. L. (Sc.)** [1916] **A. C. 364, 404**

CASES—*continued.*

—— *Liverpool Corporation* v. *Llanfyllin Assessment Committee* [1899] 2 Q. B. 14.
Referred to. METROPOLITAN WATER BOARD *v.* CHERTSEY UNION ASSESSMENT COMMITTEE
H. L. (E.) [1916] A. C. 337, 350

—— *Lucas* v. *Harris* - (1886) 18 Q. B. D. 127
Referred to. HOLLINSHEAD *v.* HAZLETON - **H. L. (I.) [1916] A. C. 428, 441**

—— *Lucey* v. *Ingram* - (1840) 6 M. & W. 302
Distinguished. BEECHGROVE S.S. Co. *v.* AKTIESELSKABET FJORD OF KRISTIANI - **H. L. (Sc.) [1916] A. C. 364, 375**

—— *Lysons* v. *Andrew Knowles & Sons* [1901] A. C. 79.
Referred to. CHURM *v.* DALTON MAIN COLLIERIES, LD.
H. L. (E.) [1916] A. C. 612, 624

—— *Maria, The* - (1839) 1 W. Rob. 95, 103
Referred to. BEECHGROVE S.S. Co. *v.* AKTIESELSKABET FJORD OF KRISTIANIA - **H. L. (Sc.) [1916] A. C. 364, 379**

—— *Metzner* v. *Bolton* - (1854) 9 Ex. 518, 521
Statement of Parke B. in, quoted. PRODUCE BROKERS CO. *v.* OLYMPIA OIL AND CAKE CO. - **H. L. (E.) [1916] A. C. 314, 324**

—— *Meyer* v. *Dresser* (1864) 16 C. B. (N.S.) 646, 660.
Statement of the law by Erle C.J. in, approved. PRODUCE BROKERS CO. *v.* OLYMPIA OIL AND CAKE CO.
H. L. (E.) [1916] A. C. 314, 324

—— *Moore* v. *Naval Colliery Co.* (1911) 5 B. W. C. C. 87.
Referred to. HERBERT *v.* FOX (SAMUEL) & Co. - **H. L. (E.) [1916] A. C. 405, 415**

—— *Morris (Herbert), Ld.* v. *Saxelby* [1915] 2 Ch. 57.
Affirmed - **H. L. (E.) [1916] A. C. 688**

—— *Myers* v. *Bradford Corporation* [1915] 1 K. B. 417.
Affirmed sub nom. BRADFORD CORPORATION *v.* MYERS
H. L. (E.) [1916] A. C. 242

—— *New River Co.* v. *Hertford Union* [1902] 2 K. B. 597.
Considered. METROPOLITAN WATER BOARD *v.* CHERTSEY UNION ASSESSMENT COMMITTEE - - **H. L. (E.) [1916] A. C. 337**

—— *Newton* v. *Cubitt* (1862) 12 C. B. (N.S.) 32
Referred to. HAMMERTON *v.* DYSART (EARL OF) **H. L. (E.) [1916] A. C. 57**

—— *North-West Transportation Co.* v. *Beatty* (1887) 12 App. Cas. 589.
Distinguished. COOK *v.* DEEKS
J. C. [1916] A. C. 554

CASES—*continued.*

—— *North Western Rubber Co. and Hüttenbach & Co., In re* [1908] 2 K. B. 907.
Overruled. PRODUCE BROKERS CO. *v.* OLYMPIA OIL AND CAKE CO.
H. L. (E.) [1916] A. C. 314

—— *Odessa, The* - - - [1915] P. 52
Affirmed - - **J. C. [1916] A. C. 145**

—— *Olympia Oil and Cake Co. and Produce Brokers Co., In re* (1915) 84 L. J. (K. B.) 1153.
Reversed - **H. L. (E.) [1916] A. C. 314**

—— *Olympic, The* - - - [1913] P. 92
Referred to. HORLOCK *v.* BEAL
H. L. (E.) [1916] A. C. 486, 493

—— *Ooster Eems, The* - (1784) 1 C. Rob. 284, n.
Discussed and explained. THE ROUMANIAN - - **J. C. [1916] A. C. 124**

—— *Plumb* v. *Cobden Flour Mills Co.* [1914] A. C. 62.
Applied. HERBERT *v.* FOX (SAMUEL) & Co. - **H. L. (E.) [1916] A. C. 405**

—— *Plummer* v. *Board of Agriculture for Scotland*, 1915 S. C. 1048.
Affirmed - **H. L. (Sc.) [1916] A. C. 675**

—— *Pratt* v. *Cuff* - (1798) cited in 4 East, 43
Referred to. HORLOCK *v.* BEAL
H. L. (E.) [1916] A. C. 486, 493

—— *Proctor* v. *S.S. Serbino (Owners)* [1915] 3 K. B. 344.
Affirmed - **H. L. (E.) [1916] A. C. 464**

—— *Reg.* v. *Mile End Old Town Overseers* (1847) 10 Q. B. 208.
Referred to. METROPOLITAN WATER BOARD *v.* CHERTSEY UNION ASSESSMENT COMMITTEE - - **H. L. (E.) [1916] A. C. 337, 349**

—— *Reg.* v. *West Middlesex Waterworks Co.* (1859) 1 E. & E. 716.
Referred to. METROPOLITAN WATER BOARD *v.* CHERTSEY UNION ASSESSMENT COMMITTEE - - **H. L. (E.) [1916] A. C. 337, 349**

—— *Rex* v. *Kensington Income Tax Commissioners* [1914] 3 K. B. 429.
Affirmed sub nom. KENSINGTON INCOME TAX COMMISSIONERS *v.* ARAMAYO
H. L. (E.) [1916] A. C. 215

—— *Richards* v. *Wrexham and Acton Collieries* [1914] 2 K. B. 497.
Distinguished. CHURM *v.* DALTON MAIN COLLIERIES, LD. - **H. L. (E.) [1916] A. C. 612**

—— *River Wear Commissioners* v. *Adamson* (1877) 2 App. Cas. 743, 763.
Judgment of Lord Blackburn in, referred to. HOLLINSHEAD *v.* HAZLETON
H. L. (I.) [1916] A. C. 428, 438

—— *Roumanian, The* - - [1915] P. 26
Affirmed - **J. C. [1916] A. C. 124**

CASES—*continued.*

—— *Ruby, The* - (1890) 6 Asp. M. L. C. 577
Referred to. BEECHGROVE S.S. Co. *v.* AKTIESELSKABET FJORD OF KRISTIANIA - - - - **H. L. (Sc.) [1916] A. C. 364, 400**

—— *Russell* v. *Reg.* - (1882) 7 App. Cas. 829
Referred to. ATT.-GEN. FOR CANADA *v.* ATT.-GEN. FOR ALBERTA
J. C. [1916] A. C. 588

—— *Sanday & Co.* v. *British and Foreign Marine Insurance Co.* [1915] 2 K. B. 781.
Affirmed - **H. L. (E.) [1916] A. C. 650**

—— *Saunders, In re* - - [1895] 2 Q. B. 424
Referred to. HOLLINSHEAD *v.* HAZLETON - **H. L. (I.) [1916] A. C. 428, 443**

—— *Sheffield United Gas Light Co.* v. *Sheffield Overseers* (1863) 4 B. & S. 135, 147.
Referred to. METROPOLITAN WATER BOARD *v.* CHERTSEY UNION ASSESSMENT COMMITTEE
H. L. (E.) [1916] A. C. 337, 350

—— *Stettin, The* - (1863) Br. & Lush. 199
Distinguished. BEECHGROVE S.S. Co. *v.* AKTIESELSKABET FJORD OF KRISTIANIA
H. L. (Sc.) [1916] A. C. 364, 376

—— *Stott (Baltic) Steamers, Ld.* v. *Marten* [1914] 3 K. B. 1262.
Affirmed - **H. L. (E.) [1916] A. C. 304**

—— *Talargoch Mining Co.* v. *St. Asaph Union* (1868) L. R. 3 Q. B. 478.
Referred to. METROPOLITAN WATER BOARD *v.* CHERTSEY UNION ASSESSMENT COMMITTEE
H. L. (E.) [1916] A. C. 337, 352

—— *Thames and Mersey Marine Insurance Co.* v. *Hamilton, Fraser & Co.* (1887) 12 App. Cas. 484.
Referred to. STOTT (BALTIC) STEAMERS, LD. *v.* MARTEN
H. L. (E.) [1916] A. C. 304, 307

—— *Tucker* v. *Linger* (1883) 8 App. Cas. 508, 511.
Statement by Lord Blackburn in, quoted. PRODUCE BROKERS CO. *v.* OLYMPIA OIL AND CAKE CO.
H. L. (E.) [1916] A. C. 314, 325

—— *United States Steel Products Co.* v. *Great Western Ry. Co.* [1914] 3 K. B. 567.
Reversed **H. L. (E.) [1916] A. C. 189**

—— *Ward, In re* - [1897] 1 Q. B. 266
Referred to. HOLLINSHEAD *v.* HAZLETON - **H. L. (I.) [1916] A. C. 428, 448**

—— *Weber, Ex parte* - [1916] 1 K. B. 280, n.
Affirmed - **H. L. (E.) [1916] A. C. 421**

—— *Wells* v. *Foster* - (1841) 8 M. & W. 149
Referred to. HOLLINSHEAD *v.* HAZLETON - **H. L. (I.) [1916] A. C. 428, 441**

CASES—*continued.*

—— *Wigglesworth* v. *Dallison* (1779) 1 Doug. 201.
Referred to. PRODUCE BROKERS CO. *v.* OLYMPIA OIL AND CAKE CO.
H. L. (E.) [1916] A. C. 314, 331

—— *Worsborough U. D. C.* v. *Barnsley British Co-operative Society, Ld.* (1914) 12 L. G. R. 1021.
Affirmed - **H. L. (E.) [1916] A. C. 291**

CIVIL LIST ACTS—Prize Court—Cargo and pledgees — Consignees under bills of lading—Ownership—Bounty of Crown —Power unimpaired by Civil List Acts *See* PRIZE COURT. 1. **145**

COAL MINES — Minimum wage—Contract of service—Construction—"Employer"—Collier and filler—Filler receiving wages directly from collier — Liability of colliery owners - - - - **612**
See MINES.

COLLISION - - - - - - - **364**
See SHIPPING. 1.

COMPANY—*Directors—Contract—Exclusion of Company—Breach of Duty — Ratification by General Meeting—Voting Power of Directors—Invalidity.*

Three directors of a company carrying on the business of railway construction contractors obtained a contract in their own names to the exclusion of the company. The contract was obtained under circumstances which amounted to a breach of trust by the directors and constituted them trustees of its benefits on behalf of the company. By their votes as holders of three-quarters of the issued shares they subsequently passed a resolution at a general meeting of the shareholders declaring that the company had no interest in the contract :—

Held, that the benefit of the contract belonged in equity to the company, and the directors could not validly use their voting powers to vest it in themselves.

North-West Transportation Co. v. *Beatty* (1887) 12 App. Cas. 589 and *Burland* v. *Earle* [1902] A. C. 83 distinguished. COOK *v.* DEEKS
J. C. 554

COMPENSATION—Employer and workman.
See WORKMEN'S COMPENSATION.

1. —— *Railway—Lands taken—Severance—Impaired Access—Noise, Smoke, and Vibration —Disjoined Properties—Railway Act (R. S. Can.*, 1906, *c.* 37), *s.* 155.

Upon the compulsory taking of lands under the Railway Act of Canada the owner is not entitled to compensation for severance from other lands owned by him, unless the lands taken are so connected with, or related to, the lands left that he is prejudiced in his ability to use or dispose of the latter. Compensation for injury likely to arise from the access to lands being rendered more difficult by reason of the railway being carried along or across streets rests with

COMPENSATION—*continued.*
the Board of Railway Commissioners upon making an order that the railway shall be so carried.

Further, an owner is not entitled to compensation for injurious affection by noise, smoke, and vibration to lands separate and disjoined from those taken. The language of s. 155 of the Railway Act is founded on that of the proviso to s. 16 of the Railways Clauses Consolidation Act, 1845, and the English decisions with regard to the effect of the latter section apply to the former. HOLDITCH *v.* CANADIAN NORTHERN ONTARIO RY. CO. - - - - - - J. C. 536

2. —— *Small Holdings — Compensation to Landlord—Diminution of Selling Value of Estate owing to Presence of Small Holdings — Small Landholders (Scotland) Act*, 1911 (1 *&* 2 *Geo.* 5, *c.* 49), *s.* 7, *sub-s.* 11.

The Small Landholders (Scotland) Act, 1911, s. 7, sub-s. 11, provides that when small holdings are compulsorily constituted on an estate, compensation shall be paid by the Board of Agriculture for Scotland, where the Scottish Land Court, or in cases where the question of compensation is referred to arbitration, the arbiter, is of opinion (inter alia) that damage or injury will be done to any landlord "in respect of any depreciation in the value of the estate" of which the land to be occupied by the new holders forms part in consequence of and directly attributable to the constitution of the new holdings as proposed :—

Held, that it was competent to an arbiter under this provision to include under the head of depreciation in the value of the estate depreciation in the selling value directly attributable to the presence of small holdings.

Decision of the Second Division of the Court of Session in Scotland, 1915 S. C. 1048, affirmed. BOARD OF AGRICULTURE FOR SCOTLAND *v.* PLUMMER - - - - - H. L. (Sc.) 675

COMPETITIVE VALUE — Rates — Railway — Joint line - - - - - - 23
See RATES. 1.

COMPULSORY PILOTAGE - - - 364
See SHIPPING. 1.

COMPULSORY PURCHASE - - . 536
See COMPENSATION. 1.

CONDITION — Railway — Carriage of goods — Condition in consignment note—General lien—Stoppage in transitu—Priority - - - - - - 189
See RAILWAY.

CONSIGNMENT NOTE—Condition in—Railway —Carriage of goods — Construction — General lien—Stoppage in transitu—Priority - - - - - - 189
See RAILWAY.

CONSTRUCTIVE TOTAL LOSS OF GOODS—Restraint of princes — Declaration of war—Frustration of contemplated adventure - - - - - - 650
See INSURANCE (MARINE). 2.

CONTRACT—*Sale of Shares—Breach by Buyer —Measure of Damages—Rise in Value after Breach—Indian Contract Act* (*IX. of* 1872), *s.* 73.

Under a contract for the sale of shares in a company the measure of damages upon a breach by the buyer is the difference between the contract price and the market price at the date of the breach, with an obligation on the part of the seller to mitigate the damages by getting the best price he can upon that date. If the seller retains the shares after the breach, he cannot recover from the buyer any further loss, if the market falls, nor is he liable to have the damages reduced, if the market rises.

Sect. 73 of the Indian Contract Act, 1872, is merely declaratory of the common law as to damages. JAMAL (A. K. A. S.) *v.* MOOLLA DAWOOD, SONS & CO. - - - J. C. 175

CONTRIBUTORY NEGLIGENCE — Continuing negligence of defendant — Cause of injury - - - - - - - 719
See NEGLIGENCE.

CONTRIBUTORY VALUE — Rates — Railway— Joint line—Actual net earnings within parish—Competitive value - - 23
See RATES. 1.

CONVEYANCING AND LAW OF PROPERTY ACT, 1881, s. 14, sub-s. 1 - - - 1
See LANDLORD AND TENANT.

COVENANT—Landlord and tenant—Covenant to repair—Notice of breach—Specification of particular breaches—Addition of general clause—Sufficiency of notice
See LANDLORD AND TENANT. 1

—— Will—Pecuniary legacy—Covenant to settle land — Trust — Satisfaction — Specific performance — Election—Appeal from Ontario - - - - - - 266
See ELECTION.

CROWN—New South Wales, Appeal from— Street improvements — Betterment charge — Liability of Crown — Purchasers from Crown—Construction of statute - - - - - - 181
See AUSTRALIA.

—— Prize Court — Cargo and pledgees—Consignees under bills of lading—Ownership—Bounty of Crown—Power unimpaired by Civil List Acts - - 145
See PRIZE COURT. 1.

CUSTOM—Rights and liabilities under contract —Sale of goods—Dispute arising out of the contract—Arbitration clause—Jurisdiction of arbitrator to determine existence of custom - - - 314
See ARBITRATION.

DAMAGES—Burma, Appeal from—Contract— Sale of shares — Breach by buyer— Measure of damages—Rise in value after breach - - - - - 175
See CONTRACT.

DISTURBANCE — Ferry — Franchise — Ferry from point to point—Change of circumstances—New traffic - - - **57**
See FERRY.

ELECTION — *Pecuniary Legacy — Covenant to settle Land—Trust—Satisfaction—Specific Performance—Canada—Ontario—Will.*

Under a covenant for value to settle land the equitable interest of the covenantee before conveyance is commensurate only with that which a Court of Equity would decree in granting specific performance.

In 1900 a half-interest in freehold premises in Toronto was conveyed to the owner of the other half-interest by his niece, in consideration of a promise in writing that she should be paid half the net rental during her life, and that after her death a half-interest in the property should be conveyed to her heirs, and that the grantee should so provide by his will. Half the net rental was paid to the niece down to the death of the grantee in 1912. By his will made in 1911 the property in question fell into the residue and the testator bequeathed to his niece thereout a legacy of 20,000 dollars. The evidence showed that this legacy was bequeathed, as the legatee knew, upon the footing that she had relinquished, or would relinquish, any claim upon the property under the agreement of 1900 :—

Held, that the testator was not a trustee of a half-interest in the property for his niece, and that she was put to her election between enforcing her claim to a half-interest therein or taking the legacy. CENTRAL TRUST AND SAFE DEPOSIT CO. *v.* SNIDER - - - **J. C. 266**

EMPLOYER AND SERVANT—Special branch of engineering business—Restraint for seven years extending to the United Kingdom—Reasonableness - **688**
See RESTRAINT OF TRADE.

ENEMY—Prize Court.
See PRIZE COURT.

ENGINEERING BUSINESS—Special branch of — Employer and servant — Restraint for seven years extending to United Kingdom—Reasonableness - **688**
See RESTRAINT OF TRADE.

EXTRAORDINARY TRAFFIC—Highway - **291**
See HIGHWAY.

FERRY — *Franchise — Disturbance — Ferry from Point to Point—Change of Circumstances —New Traffic.*

In an action for a declaration that the plaintiff is entitled to an ancient ferry and an injunction restraining the defendant from disturbing the plaintiff in the enjoyment thereof, where disturbance is not proved, the Court ought not to make a declaration of the plaintiff's title.

The plaintiffs claimed to be entitled to an ancient ferry from point to point on the river Thames. The lands on both sides of the river shortly below the plaintiffs' ferry had been recently acquired for the public for purposes

FERRY—*continued.*

of recreation, and the lands on the north side had been laid out as a public park; and as a consequence the public resorted to this part of the river in large numbers. The defendants, under a licence from the authority owning the park, moored a barge in the river adjoining the park within 600 yards of the plaintiffs' ferry, and for the convenience of the public visiting the park set up a ferry across the river between the barge and some steps on the opposite side. In an action for disturbance of ferry :—

Held, on the evidence, that, regarded as a whole, the traffic served by the defendants' ferry was created by the opening of the park, and was "new and different traffic" within the principle of *Newton* v. *Cubitt* (1862) 12 C. B. (N.S.) 32; and that the defendants' ferry was not a disturbance of the plaintiffs'.

The term "new and different traffic" explained.

Decision of the Court of Appeal [1914] 1 Ch. 822 reversed. HAMMERTON *v.* DYSART (EARL OF) - - - - - - - **H. L. (E.) 57**

FLOATING POLICY — Insurance (Marine) — Declarations—Warranty—Appeal from Western Australia - - - **281**
See INSURANCE (MARINE). 1.

FOREIGN POSSESSIONS — Income tax — Sched. D—Place of assessment—Jurisdiction of Commissioners at place of residence—Prohibition - - **215**
See REVENUE.

FORFEITURE—Vendor and purchaser—Specific performance—Time of essence—Default of purchaser — Forfeiture of money paid — Penalty — Relief—Appeal from Saskatchewan - - - - **275**
See SPECIFIC PERFORMANCE.

FRANCHISE—Ferry—Disturbance—Ferry from point to point — Change of circumstances—New traffic - - - **57**
See FERRY.

GOODS—Railway—Carriage of goods - **189**
See RAILWAY.

HABEAS CORPUS—Alien enemy—Internment —Nationality—German-born subject—Loss of German nationality by residence abroad - - - - - **421**
See ALIEN ENEMY.

HIGHWAY—*Extraordinary Traffic—Highways and Locomotives (Amendment) Act*, 1878 (41 *&* 42 *Vict. c.* 77), *s.* 23.

Where traffic is diverted from one road to another, the question of the necessity for the diversion is not relevant to the question whether the particular traffic is extraordinary on the latter road within s. 23 of the Highways and Locomotives (Amendment) Act, 1878.

It is immaterial whether the certificate of the surveyor to the road authority required to be given under s. 23 as a condition precedent to the recovery of expenses of extraordinary traffic is

HIGHWAY—*continued.*

given at the sole instance of the surveyor or at the request of the road authority.

A co-operative society having several branch shops, in the ordinary course of its business, conveyed goods to its branch shops by means of wagons drawn by traction engines. The society diverted this traffic from a main road to an alternative road, which was a country road not adapted for heavy traffic, on the ground that the urban district council had, by completely paving the main road with granite setts, rendered it dangerous for traction engine traffic. The council appointed a special committee to consider the damage done to the road in question by the society's traffic. The committee resolved that (subject to a formal written certificate of the council's surveyor) a claim for extraordinary traffic should be made against the society. After the surveyor had signed the certificate, the matter was reported to the council, who approved the decision of the committee, and an action was brought against the society to recover extraordinary expenses incurred by the council in repairing the road by reason of the damage caused by extraordinary traffic passing along it by order of the society. The society had constantly used the road in question for nearly two years before the commencement of the period covered by the claim. Rowlatt J. gave judgment for the council:—

Held, (1.) that the requirements of the statute as to the surveyor's certificate had been complied with; (2.) that there was ample evidence to support the finding of the judge that the traffic of the society was extraordinary traffic at the commencement of the period of claim.

Order of the Court of Appeal 12 L. G. R. 1021 affirmed. BARNSLEY BRITISH CO-OPERATIVE SOCIETY *v.* WORSBOROUGH U. D. C.

H. L. (E.) 291

"INCHMAREE" CLAUSE - - - 304
See INSURANCE (MARINE). 3.

INCOME TAX - - - - - - - 215
See REVENUE.

INDIA—Laws of - - - - - - 175
See CONTRACT.

INSTITUTE TIME CLAUSES, Clauses 3 and 7: STOTT (BALTIC) STEAMERS, LD. *v.* MARTEN - **H. L. (E.) [1916] A. C. 304**

INSURANCE (MARINE)—*Australia—Western Australia — Floating Policy — Declarations — Warranty — Commonwealth Marine Insurance Act* (*No.* 11 *of* 1909), *ss.* 35, 39.

By a contract of marine insurance made in Western Australia and contained in a floating policy the appellants insured all shipments of goods made by the respondents between a large number of ports against the usual marine risks, it being provided as follows: "Declarations of interest to be made to this society's agent at port of shipment where practicable or agent in London or Perth as soon as possible after sailing of vessel to which interest attaches." The respondents sued to recover a total loss of a shipment of goods as to which they had made a declaration, but had not done so as soon as possible after the sailing of the vessel:—

Held, that the provision as to the making of declarations was a promissory warranty within s. 39 of the Commonwealth Marine Insurance Act, 1909 (which reproduces s. 33 of the Marine Insurance Act, 1906), and that the appellants were consequently not liable in respect of the loss. UNION INSURANCE SOCIETY OF CANTON, LD. *v.* GEORGE WILLS & CO. - - **J. C. 281**

2. —— *Constructive Total Loss of Goods—Restraint of Princes—Declaration of War — Frustration of Contemplated Adventure — Marine Insurance Act*, 1906 (6 *Edw.* 7, *c.* 41), *ss.* 26, 60; *s.* 91, *sub-s.* 2.

Two British vessels laden with merchandise belonging to British merchants for sale in Germany were on a voyage from the Argentine to Hamburg when war broke out between the United Kingdom and Germany and the further prosecution of the voyage became illegal. The cargo owners had insured the goods on both vessels by identical voyage policies in the ordinary form, and the perils insured against included restraints of princes. Shortly after the outbreak of the war the vessels were directed (in one case by a French cruiser and in the other case by the shipowners on instructions from the Admiralty) to proceed to British ports, which they did. The cargo owners warehoused their goods and gave notice of abandonment to their underwriters, claiming on a constructive total loss:—

Held—(1.) that the rule that, where goods are insured by a marine policy at and from the port of loading to the port of destination, the frustration of the voyage by the detention of the goods for an indefinite time by a peril insured against entitled the owner, on giving notice of abandonment, to recover as for a constructive total loss has not been altered by the Marine Insurance Act, 1906, and still prevails; (2.) that the loss was directly caused by His Majesty's declaration of war, which was a restraint of princes within the meaning of the policies.

Held, therefore, that there was a constructive total loss of the goods on both ships by a peril insured against, and that the cargo owners were entitled to recover.

Decision of the Court of Appeal [1915] 2 K. B. 781 affirmed. BRITISH AND FOREIGN MARINE INSURANCE CO. *v.* SAMUEL SANDAY & CO. - - - - - - **H. L. (E.) 650**

3. —— *Perils of the Sea—Time Policy—Institute Time Clauses, clauses* 3 *and* 7.

Whilst a boiler was being lowered by a floating steam crane into the hold of a ship lying in dock, a part of the crane's tackle broke, causing the boiler to fall into the hold of the ship and thereby damaging the hull. The ship was insured under a time policy in the ordinary form with the Institute Time Clauses attached:—

Held, that the loss was not recoverable under the policy, as it was not caused by a peril of the sea or a peril ejusdem generis therewith, and that it was not within clauses 3 or 7 of the

INSURANCE (MARINE)—*continued.*
Institute Time Clauses, inasmuch as clause 3 did not enlarge the character of the risks insured against by the policy, and the risks specifically mentioned in clause 7 were not extended to matters ejusdem generis by the general words in the body of the policy.
Decision of the Court of Appeal [1914] 3 K. B. 1262 affirmed. STOTT (BALTIC) STEAMERS, LD. *v.* MARTEN - - - **H. L. (E.) 304**

IRELAND—Salary of member of Parliament
See BANKRUPTCY. **428**

JOINT LINE — Rates — Railway — Actual net earnings within parish—Contributory value—Competitive value - - **23**
See RATES. 1.

JURISDICTION — Income tax — Sched. D — Foreign possessions — Place of assessment—Jurisdiction of Commissioners at place of residence—Prohibition - **215**
See REVENUE.

LANDLORD AND TENANT — *Covenant to Repair—Notice of Breach—Specification of particular Breaches — Addition of General Clause — Sufficiency of Notice — Conveyancing and Law of Property Act*, 1881 (44 *&* 45 *Vict. c.* 41), *s.* 14, *sub-s.* 1.
A notice was served under s. 14 of the Conveyancing and Law of Property Act, 1881, by the lessor of six small houses, stating that the repairing covenants as therein set out had been broken and that the particular breaches complained of were the committing or allowing the dilapidations mentioned in the schedule annexed to the notice. The schedule indicated under general headings repairs which were required to be done in all the houses, and in a few instances only specified repairs to be done in particular houses. In some instances it required the lessee to "examine and repair" specified parts of the houses. The schedule concluded with the words "And note that the completion of the items mentioned in this schedule does not excuse the execution of other repairs if found necessary" :—
Held, that the notice sufficiently specified the particular breaches complained of, and that it was not vitiated by the addition of the general clause at the end.
Decision of the Court of Appeal [1914] 2 K. B. 109 affirmed. FOX *v.* JOLLY - **H. L. (E.) 1**

LIEN—Railway—Carriage of goods—Condition in consignment note—Construction—General lien—Stoppage in transitu—Priority - - - - - **189**
See RAILWAY.

LIMITATIONS, STATUTES OF — *Executor—Accrual of Right to sue — Testator domiciled Abroad — Probate — "Capable of instituting suit"—Devolution of Interest—Substitution of Plaintiff—Straits Settlements Ordinance No.* 6 *of* 1896, *ss.* 17, 22—*Straits Settlements Ordinance No.* 31 *of* 1907, *ss.* 133, 196.
Straits Settlements Ordinance No. 6 of 1896, which deals with the limitation of suits, provides as follows :—Sect. 17, sub-s. 1 : "When a person who would, if he were living, have a right to institute a suit or make an application, dies before the right accrues, the period of limitation shall be computed from the time when there is a legal representative of the deceased capable of instituting or making such suit or application." Sect. 22 : "When, after the institution of a suit, a new plaintiff or defendant is substituted or added, the suit shall as regards him be deemed to have been instituted when he was so made a party . . . ." :—
Held, (1.) that the executor of a will capable of probate in the Straits Settlements is a legal representative capable of instituting a suit, within the meaning of s. 17, sub-s. 1, from the date of the testator's death, and not only from the date when he obtains probate : *quaere* as to an executor who renounces probate ; (2.) that, according to the English practice (which is made applicable in the Straits Settlements in the absence of any other provision), the will of a testator domiciled in British India, or elsewhere outside the Straits Settlements, although not proved in the place of the testator's domicil, is capable of probate in the Straits Settlements, if (*a*) it is valid according to the law of the testator's place of domicil, and (*b*) if there are assets of the testator in the Straits Settlements ; (3.) that s. 22 contemplates cases in which a suit is defective by reason of the right persons not having been made parties, but not cases in which the suit was originally properly constituted but has become defective owing to a devolution of interest ; in the latter circumstances a carrying-on order should be made under s. 169 of the Civil Procedure Ordinance No. 31 of 1907.
MEYAPPA CHETTY *v.* SUPRAMANIAN CHETTY **J. C. 603**

2. —— *Public Authorities' Protection — Limitation of Time for bringing Action—Corporation carrying on Trade under Statutory Powers—Action of Negligence—Statutory Duty or Authority — Private Obligation — Public Authorities Protection Act*, 1893 (56 *&* 57 *Vict. c.* 61), *s.* 1.
The defendants, a municipal corporation, were authorized by Act of Parliament to carry on the undertaking of a gas company and were bound to supply gas to the inhabitants of the district, and they were also empowered to sell the coke produced in the manufacture of the gas. The defendants contracted to sell and deliver a ton of coke to the plaintiff, and by the negligence of their agent the coke was shot through the plaintiff's shop window. More than six months afterwards the plaintiff commenced an action of negligence against the defendants. The defendants pleaded s. 1 of the Public Authorities Protection Act, 1893, as a bar to the action :—
Held, that the act complained of was not an act done in the direct execution of a statute, or in the discharge of a public duty or the exercise of a public authority, and that the Public Authorities Protection Act, 1893, afforded no defence to the action.
Decision of the Court of Appeal [1915] 1 K. B. 417 affirmed. BRADFORD CORPORATION *v.* MYERS - - - - - **H. L. (E.) 242**

MARINE INSURANCE.
See INSURANCE (MARINE).

MERCHANT SHIPPING ACT, 1894.
See SHIPPING.

MINES—*Minimum Wage—Contract of Service — Construction — "Employer" — Collier and Filler—Filler receiving Wages directly from Collier—Liability of Colliery Owners — Coal Mines (Minimum Wage) Act*, 1912 (2 *Geo.* 5, *c.* 2), *s.* 1, *sub-s.* 1.

A colliery company usually assigned two workmen, a collier and a filler, to each underground working place or stall, but occasionally a double or treble set of men, composed of an equal number of colliers and fillers, worked together in one stall. The men were paid upon a tonnage rate in accordance with the coal gotten. A weekly pay-note was made out to the number of the stall and the money was paid to the collier, or, in the case of double or treble sets, to one of the colliers. The division of the pay between the collier and the filler was a matter of private bargain between them. On entering the service of the colliery company all the workmen, whether colliers or fillers, were bound to sign three documents, one of which contained the by-laws of the company. By by-law 2, "All persons employed . . . . shall receive wages and payment according to the current rate of wages for the time being at the colliery." By by-law 13, "All persons working under or for or paid by contractors or other persons shall be deemed to be the servants of the owners of the colliery to the extent only that they shall be bound to obey these by-laws and the other rules of the colliery, but the owners of the colliery shall not be bound to see to the payment of or be liable for the wages due to such persons after they have paid the contractor or other person for whom such persons work."

A filler worked with a collier in a stall under an arrangement whereby the collier first took for himself for each shift 1*s.*, and the balance was equally divided in accordance with the number of shifts worked by each of the two men. In a certain week the balance coming to the filler under this arrangement was less than the minimum wage to which he was entitled under the Coal Mines (Minimum Wage) Act, 1912. The filler claimed a minimum wage from the colliery company. The company, who for all purposes other than the payment of wages were the employers of the filler, pleaded that they were not his employers for the purposes of the Act:—

Held, assuming without deciding that the "contract of employment" mentioned in s. 1, sub-s. 1, of the Coal Mines (Minimum Wage) Act, 1912, meant a contract of employment at wages, that an obligation was imposed on the colliery company to pay wages to the filler by by-law 2 and was not taken away by by-law 13, and that the company were the employers of the filler within the meaning of the Act and were liable to pay him a minimum wage.

Per Lord Shaw of Dunfermline: For the purposes of s. 1, sub-s. 1, of the Coal Mines (Minimum Wage) Act, 1912, it is not necessary that the employer should be also the paymaster of the workman.

Richards v. *Wrexham and Acton Collieries* [1914] 2 K. B. 497 distinguished.

Decision of the Court of Appeal reversed.
CHURM *v.* DALTON MAIN COLLIERIES, LD.
H. L. (E.) 612

MINIMUM WAGE—Mines—Contract of service—Construction—"Employer"—Collier and filler — Filler receiving wages directly from collier — Liability of colliery owners - - - - 612
See MINES.

NATIONALITY—Loss of - - - - 421
See ALIEN ENEMY.

NEGLIGENCE—*Contributory Negligence—Continuing Negligence of Defendant — Cause of Injury.*

The principle that the contributory negligence of a plaintiff will not disentitle him to recover damages, if the defendant, by the exercise of care, might have avoided the result of that negligence, applies where the defendant, although not committing any negligent act subsequently to the plaintiff's negligence, has incapacitated himself by his previous negligence from exercising such care as would have avoided the result of the plaintiff's negligence.

Judgment of Anglin J. in *Brenner* v. *Toronto Ry. Co.* (1907) 13 Ont. L. R. 423 approved.
BRITISH COLUMBIA ELECTRIC RY. CO. *v.* LOACH - - - - J. C. [1916] A. C. 719

—— Public authorities' protection—Limitation of time for bringing action—Action of negligence—Statutory duty or authority—Private obligation - - - 242
See LIMITATIONS, STATUTES OF. 2.

NEW SOUTH WALES—Laws of - - 181
See AUSTRALIA.

NORTH GERMAN NATIONALITY LAW OF JUNE 1, 1870 - - - - 421
See ALIEN ENEMY.

NOTICE—Covenant to repair—Notice of breach—Specification of particular breaches—Addition of general clause—Sufficiency of notice - - - - 1
See LANDLORD AND TENANT.

—— Purchaser with notice—Roman-Dutch law—Assignability—Appeal from South Africa - - - - - - 167
See SOUTH AFRICA.

ONTARIO—Laws of—Canada - - - 266
See ELECTION.

PARLIAMENT—Salary of member of—Appropriation for benefit of creditors - 428
See BANKRUPTCY.

PARTNERSHIP—Expiration of term—Partners continuing business—Right to sue in partnership name—Seychelles—French Codes - - - - - - - 545
See SEYCHELLES.

PENALTY — Vendor and purchaser — Specific performance—Time of essence—Default of purchaser—Forfeiture of money paid —Penalty—Relief—Appeal from Saskatchewan - - - - - - **275**
See SPECIFIC PERFORMANCE.

PERFORMANCE—Specific performance - **275**
See SPECIFIC PERFORMANCE.

PERILS OF THE SEA—Insurance (Marine)—Time policy—Institute Time Clauses, clauses 3 and 7 - - - - - **304**
See INSURANCE (MARINE). 3.

PILOT - - - - - - - - - **364**
See SHIPPING. 1.

PLEDGEES—Prize Court—Cargo and pledgees—Consignees under bills of lading—Ownership—Bounty of Crown—Power unimpaired by Civil List Acts - **145**
See PRIZE COURT. 1.

PRIVY COUNCIL APPEALS.
See AUSTRALIA — CANADA — COMPENSATION — ELECTION — LIMITATIONS, STATUTES OF—NEGLIGENCE — PRIZE COURT — SEYCHELLES — SOUTH AFRICA—SPECIFIC PERFORMANCE.

PRIZE COURT — *Cargo and Pledgees — Consignees under Bills of Lading—Ownership—Bounty of Crown—Power unimpaired by Civil List Acts—Civil List Act*, 1910 (10 *Edw.* 7 *&* 1 *Geo.* 5, *c.* 28).

The Prize Court does not recognize the claim of a pledgee of cargo seized as prize, the legal ownership of which was at the time of seizure in an enemy subject, and this rule applies to a pledgee who is holder of the bills of lading and is named therein as consignee of the cargo. In determining national character legal ownership is the sole criterion.

The power of bounty which the Crown was accustomed to exercise by way of redress of hardship to subjects or neutrals from decrees of the Prize Court exists unimpaired by the Civil List Acts. THE ODESSA. THE WOOLSTON
J. C. **145**

2. —— *Enemy Cargo in British Ship—Outbreak of Hostilities—Diversion to British Port — Part Cargo discharged into Oil Tanks — Liability to Seizure.*

A cargo of petroleum oil in bulk, owned by a German company, was shipped at a neutral port on board a British vessel bound for Hamburg. The vessel reached the English Channel after the outbreak of hostilities between Great Britain and Germany and was diverted by her owners to Purfleet, where, under their orders, she proceeded to discharge the oil into tanks on shore. When the larger part of the oil had been so discharged, the whole cargo was seized as prize. It was subsequently condemned as lawful prize and as droits of admiralty :—

Held—(1.) that the cargo was not immune from condemnation by reason of having been shipped in a British vessel before the outbreak

PRIZE COURT—*continued.*

of hostilities; (2.) that the jurisdiction of the Prize Court extended to the oil seized while in the tanks, since that jurisdiction depended not upon the situation of the oil when seized, but upon the fact that it was seized as prize; (3.) that, the whole cargo having become liable to seizure and condemnation upon the outbreak of hostilities, the oil discharged into the tanks did not cease to be so liable by reason of the discharge, and that this was the case whether or not the tanks formed part of the port.

The Ooster Eems (1784) 1 C. Rob. 284, n., discussed and explained. THE ROUMANIAN
J. C. **124**

PROHIBITION — Income tax — Sched. D — Foreign possessions—Place of assessment — Jurisdiction of Commissioners at place of residence - - - **215**
See REVENUE.

PUBLIC AUTHORITIES' PROTECTION—Limitation of time for bringing action—Action of negligence—Statutory duty or authority—Private obligation - **242**
See LIMITATIONS, STATUTES OF. 2.

PURCHASER—Vendor and.
See SOUTH AFRICA, SPECIFIC PERFORMANCE, and VENDOR AND PURCHASER.

RAILWAY—*Carriage of Goods—Condition in Consignment Note—Construction—General Lien —Stoppage in transitu—Priority.*

The vendors of goods, an American company, authorized their agents, on the arrival of the goods in England, to deliver the goods to a railway company for carriage to the buyers upon the terms of a consignment note which contained a condition that all goods delivered to the company would be received and held by them subject to a lien for money due to them for the carriage of and other charges upon such goods, and also to a general lien for any moneys due to them from the owners of such goods upon any account. The vendors' agents accordingly delivered the goods to the railway company for carriage to the buyers. The vendors had paid all freight and charges in respect of the carriage of the goods. While the goods were still in the possession of the railway company as carriers, the vendors, being unpaid and having been informed that the buyers were insolvent, gave notice of stoppage in transitu to the railway company. The buyers, who had meanwhile become owners of the goods by indorsement and delivery of the bill of lading, were indebted to the railway company in the sum of 1170*l.* on a general account. The company claimed, under a condition in the consignment note, that they had a lien as against the vendors in respect of the 1170*l.* due from the buyers :—

Held, that the condition did not confer on the railway company a right to assert a general lien on the goods in respect of the debt of the buyers in priority to the vendors' right of stoppage in transitu.

Decision of the Court of Appeal [1914] 3

RAILWAY—*continued.*
K. B. 567 reversed and decision of Pickford J. [1913] 3 K. B. 357 restored. UNITED STATES STEEL PRODUCTS CO. *v.* GREAT WESTERN RY. CO. - - - - - - **H. L. (E.) 189**

—— Rates — Joint line — Actual net earnings within parish — Contributory value — Competitive value - - - **23**
See RATES. 1.

RATES — *Railway — Joint Line — Actual Net Earnings within Parish—Contributory Value—Competitive Value.*

A suburban railway, constructed by a company since dissolved, ran from H. to W., where it joined the Great Western Railway, which in turn joined the Metropolitan Railway at B. The appellants, the Great Western and Metropolitan Railway Companies, were jointly owners and occupiers of this railway under a conveyance confirmed by Act of Parliament, and were thereby enabled to run a through service of trains from H. to the city of London. On an appeal against an assessment for rating purposes of the running lines of this railway, the quarter sessions found that the railway earned no profits but had a contributory value as a feeder to the appellants' systems, but held that they were not entitled to have regard to its contributory value. They also found that, apart from treating the appellants as possible competitors for the railway, the railway had no competitive value, and that competition was possible between the appellants only on the assumption that after the dissolution of the existing partnership the Metropolitan Railway Company was still to be considered as having running powers over the Great Western Railway between the points B. and W.; and, excluding competitive value, they assessed the line solely on its net earnings in the parish and fixed the rateable value thereof at a nominal amount:—

Held—(1.) applying the principle of *Great Central Ry. Co.* v. *Banbury Union Assessment Committee* [1909] A. C. 78, and distinguishing *East London Railway Joint Committee* v. *Greenwich Union Assessment Committee* [1913] 1 K. B. 612, that contributory value ought not to be taken into account; (2.) that no question of competitive value arose; (3.) that the line had been rightly assessed on the basis of its net earnings in the parish.

Decision of the Court of Appeal reversed. GREAT WESTERN AND METROPOLITAN RY. COS. *v.* KENSINGTON ASSESSMENT COMMITTEE; SAME *v.* HAMMERSMITH ASSESSMENT COMMITTEE - - - - - - **H. L. (E.) 23**

2. —— *Waterworks—Assessment—Indirectly productive Portion of Undertaking — Annual Value—Interest on Cost of Land and Buildings—Rate of Interest—Added Value in respect of Special Fitness of Land for Purposes of Undertaking.*

Upon an appeal by a Water Board against an assessment to the poor rate of certain land vested in the Board by Act of Parliament, and comprising an intake from the river Thames and a pumping station, quarter sessions, in accordance with the usual practice in rating indirectly productive portions of a water undertaking, assessed the annual value of the hereditaments at 4 per cent. on the cost of the land and 5 per cent. on the cost of the buildings; and they held (1.) that no further sum should be added for enhanced value in respect of the user of the intake and the statutory right of appropriating water from the river by that means, or in respect of the special fitness of the land for that purpose; (2.) that the percentage on cost representing the annual value ought not to be reduced by reason of the special facilities of the Water Board for borrowing below the current rate of interest:—

Held, first, that the user of the intake and the statutory right of appropriating water by that means were not rateable subjects, and that, in the absence of evidence to the contrary, the special fitness of the land for the purposes of the undertaking must be taken to have been covered by the price paid for the land; secondly, that, in cases where it was proper to ascertain the annual value on the basis of interest on cost, the rate of interest did not depend upon the financial position of the occupier.

Held, therefore, that quarter sessions were right on both points.

New River Co. v. *Hertford Union* [1902] 2 K. B. 597 considered.

Decision of the Court of Appeal (12 L. G. R. 1248) reversed. METROPOLITAN WATER BOARD *v.* CHERTSEY UNION ASSESSMENT COMMITTEE **H. L. (E.) 337**

RELIEF—Vendor and purchaser—Specific performance—Time of essence—Default of purchaser—Forfeiture of money paid—Penalty — Relief — Appeal from Saskatchewan - - - - - **275**
See SPECIFIC PERFORMANCE.

REPAIR—Covenant to repair—Notice of breach—Specification of particular breaches—Addition of general clause—Sufficiency of notice - - - - - - **1**
See LANDLORD AND TENANT.

RESTRAINT OF PRINCES — Declaration of war — Frustration of contemplated adventure - - - - - **650**
See INSURANCE (MARINE). 2.

RESTRAINT OF TRADE — *Special Branch of Engineering Business—Employer and Servant—Restraint for Seven Years extending to United Kingdom—Reasonableness.*

In determining whether a covenant in restraint of trade is enforceable, a covenant exacted by the purchaser from the vendor on a sale of the goodwill of a business stands on a different footing from a covenant exacted by an employer against his employee; and *semble* in the latter case a covenant against competition per se will not be enforced.

The plaintiff company were the leading manufacturers of hoisting machinery in the United Kingdom, and the defendant had been in the company's employment as draughtsman and otherwise from the time he left school. After

RESTRAINT OF TRADE—*continued.*
several years' service the defendant was engaged by the company as engineer for two years certain and thereafter, subject to four months' notice on either side, upon the terms of an agreement which contained a covenant by the defendant with the company that he would not during a period of seven years from his ceasing to be employed by the company, either in the United Kingdom of Great Britain or Ireland, carry on either as principal, agent, servant, or otherwise, alone or jointly or in connection with any other person, firm, or company, or be concerned or assist, directly or indirectly, whether for reward or otherwise, in the sale or manufacture of pulley blocks, hand overhead runways, electric overhead runways, or hand overhead travelling cranes :—

Held, that the covenant was wider than was required for the protection of the plaintiff company and was not enforceable.

Decision of the Court of Appeal [1915] 2 Ch. 57 affirmed. HERBERT MORRIS, LD. *v.* SAXELBY **H. L. (E.) 688**

REVENUE—*Income Tax—Sched. D—Foreign Possessions—Place of Assessment—Jurisdiction of Commissioners at Place of Residence—Prohibition—Income Tax Act*, 1842 (5 & 6 *Vict. c.* 35), *ss.* 106, 108.

The duty of the additional Commissioners under the Income Tax Acts is to make a preliminary ascertainment of the amount of duty to be charged, subject to confirmation by the General Commissioners, whose function it is to impose liability upon the taxpayer, and an assessment is not operative until signed and confirmed by the General Commissioners.

Sect. 106 of the Income Tax Act, 1842, contains an exhaustive classification of the persons subject to duty under Sched. D and deals exhaustively (apart from the special provisions of s. 48) with the question where such persons are chargeable, except in the case of profits arising from foreign possessions, which is dealt with by s. 108 to the exclusion of s. 106 ; and, with that exception, a person subject to duty under Sched. D is chargeable in one place only, to be ascertained from the provisions of s. 106.

The second class mentioned in s. 106, which comprises persons engaged in trade, includes a person engaged in trade as a partner.

The words "shall be chargeable" used in reference to the second class have the same meaning as the words "shall be charged" used in respect of the three other classes mentioned in the section, and create an exclusive and not an alternative place of charge.

Sect. 108, which provides that the duty in respect of profits arising from foreign possessions "may be . . . . assessed" in London, Bristol, Liverpool, and Glasgow, and "shall be . . . . assessed and charged by the Commissioners acting for such of the said places at or nearest to which such property shall have been first imported into Great Britain," is not optional but imperative, and is to be read as a proviso on and as creating an exception to s. 106, so that profits arising from foreign possessions are to be charged exclusively at the place therein provided.

REVENUE—*continued.*

Semble, s. 48, which provides for the assessment of persons neglecting or refusing to make the returns required by the Act, does not empower the Commissioners to assess the taxpayer in the sense of imposing a liability upon him.

Where, therefore, a householder resident in Kensington carried on trade in the city of London and was formerly also a member of a foreign firm (which carried on no trade and owned no possessions in the United Kingdom) and received profits from the business of the foreign firm in the city of London :—

Held, that the Commissioners for Kensington had no jurisdiction to assess him in respect of such profits, and that the Commissioners for the city of London were the proper authority to make the assessment.

Decision of the Court of Appeal [1914] 3 K. B. 429 affirmed. KENSINGTON INCOME TAX COMMISSIONERS *v.* ARAMAYO - **H. L. (E.) 215**

ROMAN-DUTCH LAW—Africa—South Africa—Servitude—Right to trade upon lands—Assignability—Purchaser with notice
See SOUTH AFRICA. **167**

SALARY OF MEMBER OF PARLIAMENT—Appropriation for benefit of creditors
See BANKRUPTCY. **428**

SALE OF GOODS—Arbitration—Dispute arising out of the contract—Custom affecting rights and liabilities under the contract—Jurisdiction of arbitrator to determine existence of custom - - - **314**
See ARBITRATION.

SASKATCHEWAN—Laws of.
See SPECIFIC PERFORMANCE.

SATISFACTION — Will — Pecuniary legacy — Covenant to settle land — Trust — Specific performance — Election — Appeal from Ontario - - - **266**
See ELECTION.

SEIZURE—Prize Court—Enemy cargo in British ship—Outbreak of hostilities—Diversion to British port—Part cargo discharged into oil tanks—Liability to seizure **124**
See PRIZE COURT. 2.

SERVITUDE — Africa—South Africa—Roman-Dutch law—Right to trade upon lands—Assignability—Purchaser with notice
See SOUTH AFRICA. **167**

SEYCHELLES — *French Codes—Partnership—Expiration of Term—Partners continuing Business—Right to sue in Partnership Name—Code Civil, arts.* 1834, 1865, *and* 1866—*Code de Commerce, art.* 42.

Under the provisions of the French Code Civil and Code de Commerce, which apply in Mauritius and the Seychelles, when the period expires for which a partnership (société en nom collectif) has been made, it ceases to exist as a legal entity, save for the purpose of liquidation by a duly appointed liquidator, and

SEYCHELLES—*continued.*

it cannot sue for debts due to the partnership. The surviving partners cannot re-create or prolong the partnership by continuing the former business in the partnership name without entering into a fresh written agreement. If they so continue the business, they cannot sue in the partnership name to recover money advanced and goods supplied partly before and partly after the time fixed for the expiration of the partnership. SAID & CO. *v.* MAMODE HADEE - **J. C. 545**

SHIPPING—*Collision—Compulsory Pilot—Ship in Charge of Pilot outside Area of Compulsory Pilotage—Master and Servant—Merchant Shipping Act*, 1894 (57 & 58 *Vict. c.* 60), *s.* 633—*Clyde Navigation (Consolidation) Act*, 1858 (21 & 22 *Vict. c. cxlix.*), *ss.* 75, 128, 134, 136.

The exemption from liability granted by s. 633 of the Merchant Shipping Act, 1894, in the case of compulsory pilotage is confined to the area in which the employment of a qualified pilot is compulsory by law and does not extend to the whole of a pilotage district which includes as part thereof an area of compulsory pilotage.

General Steam Navigation Co. v. *British and Colonial Steam Navigation Co.* (1869) L. R. 4 Ex. 238 overruled on this point.

The Charlton (1895) 8 Asp. M. L. C. 29 overruled.

The Clyde Navigation (Consolidation) Act, 1858, makes pilotage compulsory within the area of the river Clyde and fixes the western or outward limit of that area some four miles above Greenock. The Clyde Pilot Board, which under the Act had the sole right of licensing pilots for the navigation of the river and Firth of Clyde, licensed river pilots to pilot vessels between Greenock and places in the river area, and by its by-laws made under the Act provided that such pilots should be remunerated for the whole distance between Greenock and Glasgow and that the pilot when on board should have sole charge of the vessel. The owners of an inward-bound vessel in charge of a pilot taken on board at Greenock pleaded compulsory pilotage as a defence to an action of damages arising out of a collision which took place off Greenock :—

Held—(1.) that the owners did not fall within the exemption granted by the Merchant Shipping Act, 1894 ; (2.), Lord Dunedin doubting, that, apart from the Act of 1894, the by-laws imposed no legal compulsion on the captain to resign the navigation into the hands of the pilot; and that the plea was bad.

Decision of the First Division of the Court of Session in Scotland, 1915 S. C. 281, reversed. STEAMSHIP BEECHGROVE CO. *v.* AKTIESELSKABET FJORD OF KRISTIANIA - **H. L. (Sc.) 364**

2. —— Prize Court.
See PRIZE COURT.

3. —— *Seaman — Wages — Termination of Service—Detention in Enemy Port—Imprisonment of Crew—"Loss of the ship"—Merchant Shipping Act*, 1894 (57 & 58 *Vict. c.* 60), *ss.* 143, 158.

A British ship during a voyage for which a British seaman had signed articles, being in a

SHIPPING—*continued.*

German port when war was declared between the United Kingdom and the German Empire, was immediately detained, and some months later the crew were imprisoned. The ship was still detained and the crew imprisoned when this action for an allotment of wages was commenced :—

Held—(1.) that the detention of the ship did not constitute "the loss of the ship" within s. 158 of the Merchant Shipping Act, 1894 ; but (2.) (Lord Parmoor dissenting) that the seaman ceased to be entitled to his wages as soon as the further performance of the contract became impossible ; (3.) by Lord Atkinson, Lord Shaw of Dunfermline, and Lord Wrenbury, that the further performance of the contract had become impossible from the date of the detention of the ship ; by Earl Loreburn, from the date of the imprisonment of the crew.

Hadley v. *Clarke* (1799) 8 T. R. 259 and *Beale* v. *Thompson* (1804) 4 East, 546 distinguished.

Decision of the Court of Appeal [1915] 3 K. B. 627 reversed. HORLOCK *v.* BEAL
H. L. (E.) 486

SMALL HOLDINGS — Diminution of selling value of estate owing to presence of small holdings - - - - **675**
See COMPENSATION. 2.

SOUTH AFRICA—*Roman-Dutch Law—Servitude—Right to Trade upon Lands—Assignability—Purchaser with Notice.*

In 1895 the then registered owners of land in Southern Rhodesia granted to a company the right to trade in certain parts of it. The company subsequently went into liquidation, and all its assets were bought by the appellants, who received possession of certain sites under the agreement and erected stores thereon. No servitude or incumbrance was registered in respect of the agreement. After mesne assignments the respondents became owners of the land with a clear registered title, and sued for a declaration that the appellants were not entitled to occupy any part of it, and for ejectment. The appellants pleaded that by virtue of the agreement they had an exclusive right to trade upon the land and to occupy such sites thereon as were necessary for that purpose, and that the respondents purchased with notice and subject to their rights :—

Held, that the respondents were entitled to judgment upon the case as pleaded, but that the appellants should have conditional leave to amend their defence by pleading possession of specific sites under the agreement and the expenditure of money thereon, and that the respondents bought with notice of those facts.

Quaere whether according to the law in Southern Rhodesia the defence so amended would be an answer to the claim as to the specific sites referred to. COPTHALL STORES, LD. *v.* WILLOUGHBY'S CONSOLIDATED CO.
J. C. 167

SPECIFIC PERFORMANCE—*Vendor and Purchaser—Time of Essence—Default of Purchaser*

SPECIFIC PERFORMANCE—*continued.*

—Forfeiture of Money paid—Penalty—Relief—Saskatchewan.

By an agreement in writing dated December 9, 1909, land in the province of Saskatchewan was sold for 16,000 dollars, of which 1000 dollars were paid on signing the agreement and the balance was payable by six annual instalments on December 1 of each year. The agreement provided that, if the purchaser should make default in any of the payments, the vendor should be at liberty to cancel the agreement and to retain, as liquidated damages, the payments already made, and that time was to be considered as of the essence of the agreement. Default having been made in the payment of the first instalment, the vendor cancelled the agreement; assignees of the purchaser sued for specific performance:—

Held that, the parties having made time of the essence of the agreement, specific performance could not be decreed, but that the forfeiture of the money paid was a penalty from which relief should be granted on proper terms.

Kilmer v. *British Columbia Orchard Lands* [1913] A. C. 319 explained. STEEDMAN *v.* DRINKLE - - - - - - **J. C. 275**

STATUTES:—

I. IMPERIAL STATUTES.

1842.

5 & 6 Vict. c. 35 (Income Tax), ss. 106, 108: KENSINGTON INCOME TAX COMMISSIONERS *v.* ARAMAYO - **H. L. (E.) [1916] A. C. 215**

1858.

21 & 22 Vict. c. cxlix. (Clyde Navigation Consolidation), ss. 75, 128, 134, 136: BEECHGROVE S.S. Co. *v.* AKTIESELSKABET FJORD OF KRISTIANIA **H. L. (Sc.) [1916] A. C. 364**

1872.

35 & 36 Vict. c. 58 (Bankruptcy (Ireland)), s. 51: HOLLINSHEAD *v.* HAZLETON **H. L. (I.) [1916] A. C. 428**

1878.

41 & 42 Vict. c. 77 (Highways and Locomotives), s. 23: BARNSLEY BRITISH CO-OPERATIVE SOCIETY *v.* WORSBOROUGH U. D. C. - **H. L. (E.) [1916] A. C. 291**

1881.

44 & 45 Vict. c. 41 (Conveyancing and Law of Property), s. 14, sub-s. 1: FOX *v.* JOLLY **H. L. (E.) [1916] A. C. 1**

1893.

56 & 57 Vict. c. 61 (Public Authorities Protection), s. 1: BRADFORD CORPORATION *v.* MYERS - **H. L. (E.) [1916] A. C. 242**

1894.

57 & 58 Vict. c. 60 (Merchant Shipping), ss. 143, 158: HORLOCK *v.* BEAL **H. L. (E.) [1916] A. C. 486**

STATUTES—*continued.*

57 & 58 Vict. c. 60, s. 633: BEECHGROVE S.S. Co. *v.* AKTIESELSKABET FJORD OF KRISTIANIA **H. L. (Sc.) [1916] A. C. 364**

1906.

6 Edw. 7, c. 41 (Marine Insurance), ss. 26, 60; s. 91, sub-s. 2: BRITISH AND FOREIGN MARINE INSURANCE Co. *v.* SANDAY (SAMUEL) & Co. - **H. L. (E.) [1916] A. C. 650**

6 Edw. 7, c. 58 (Workmen's Compensation), s. 1, sub-s. 1: HERBERT *v.* FOX (SAMUEL) & Co. **H. L. (E.) [1916] A. C. 405**

HUTCHISON (J. & P.) *v.* M'KINNON **H. L. (Sc.) [1916] A. C. 471**

SERBINO S.S. (OWNERS) *v.* PROCTOR **H. L. (E.) [1916] A. C. 464**

1910.

10 Edw. 7 & 1 Geo. 5, c. 28 (Civil List): THE ODESSA - - **J. C. [1916] A. C. 145**

1911.

1 & 2 Geo. 5, c. 49 (Small Landholders (Scotland)), s. 7, sub-s. 11: BOARD OF AGRICULTURE FOR SCOTLAND *v.* PLUMMER - **H. L. (Sc.) [1916] A. C. 675**

1912.

2 Geo. 5, c. 2 (Coal Mines (Minimum Wage)), s. 1, sub-s. 1: CHURM *v.* DALTON MAIN COLLIERIES, LD. **H. L. (E.) [1916] A. C. 612**

II. COLONIAL STATUTES.

Australia, Statute of:

Commonwealth Marine Insurance Act (No. 11 of 1909), ss. 35, 39: UNION INSURANCE SOCIETY OF CANTON, LD. *v.* WILLS (GEORGE) & Co. **J. C. [1916] A. C. 281**

New South Wales, Statute of:

Moore Street Improvement Act, 1890 (N.S.W. 54 Vict. No. 30), ss. 4, 5, 6: BANK OF AUSTRALASIA *v.* SYDNEY MUNICIPAL COUNCIL **J. C. [1916] A. C. 181**

Canada, Statutes of:

1867.

30 & 31 Vict. c. 3 (British North America), ss. 12, 46, 91, 92: BONANZA CREEK GOLD MINING Co. *v.* REX **J. C. [1916] A. C. 566**

—— —— ss. 91, 92: ATT.-GEN. FOR CANADA *v.* ATT.-GEN. FOR ALBERTA **J. C. [1916] A. C. 588**

1892.

55 Vict. c. 60, (Ontario (Public Schools)), s. 4: ONTARIO POWER Co. OF NIAGARA FALLS *v.* STAMFORD MUNICIPAL CORPORATION **J. C. [1916] A. C. 529**

STATUTES—*continued.*

1897.

R. S. Ont., c. 191 (Ontario—Companies), s. 9 : BONANZA CREEK GOLD MINING CO. *v.* REX - **J. C. [1916] A. C. 566**

1906.

R. S. Can., c. 37 (Railway), s. 155 : HOLDITCH *v.* CANADIAN NORTHERN ONTARIO RY. CO. - **J. C. [1916] A. C. 536**

1910.

9 & 10 Edw. 7, c. 32 (Canada—Insurance Act), ss. 4, 70 : ATT.-GEN. FOR CANADA *v.* ATT.-GEN. FOR ALBERTA **J. C. [1916] A. C. 588**

India, Statute of :

Indian Contract Act (IX. of 1872), s. 73 : JAMAL *v.* MOOLLA DAWOOD, SONS & CO. - - **J. C. [1916] A. C. 175**

Seychelles :

French Codes—Code de Commerce, art. 42 : SAID & CO. *v.* MAMODE HADEE **J. C. [1916] A. C. 545**

—— Code Civil, arts. 1834, 1865, and 1866 : SAID & CO. *v.* MAMODE HADEE **J. C. [1916] A. C. 545**

Straits Settlements :

Straits Settlements Ordinance No. 6 of 1896, ss. 17, 22 ; Ordinance No. 31 of 1907, ss. 133, 196 : MEYAPPA CHETTY *v.* SUPRAMANIAN CHETTY **J. C. [1916] A. C. 603**

STOPPAGE IN TRANSITU—Railway—Carriage of goods — Condition in consignment note — Construction — General lien — Priority - - - - - - **189**
See RAILWAY.

STRAITS SETTLEMENTS. - - - **603**
See LIMITATIONS, STATUTES OF. 1.

TENANT—Landlord and.
See LANDLORD AND TENANT.

TIME—Public authorities' protection—Limitation of time for bringing action — Action of negligence—Statutory duty or authority—Private obligation - **242**
See LIMITATIONS, STATUTES OF. 2.

—— Vendor and purchaser—Specfic performance Time of essence—Default of purchaser —Forfeiture of money paid—Penalty—Relief—Appeal from Saskatchewan - **275**
See SPECIFIC PERFORMANCE.

TIME POLICY—Insurance (Marine)—Perils of the sea - - - - - - **304**
See INSURANCE (MARINE). 3.

TRAFFIC—New traffic — Ferry — Franchise — Disturbance—Ferry from point to point —Change of circumstances - **57**
See FERRY.

TRUST—Will—Pecuniary legacy—Covenant to settle land — Satisfaction — Specific performance — Election—Appeal from Ontario - - - - - - **266**
See ELECTION.

VENDOR AND PURCHASER
See SOUTH AFRICA and SPECIFIC PERFORMANCE.

WAR—Declaration.
See INSURANCE (MARINE) and PRIZE COURT.

WARRANTY — Insurance (Marine) — Floating policy — Declarations — Appeal from Western Australia - - - **281**
See INSURANCE (MARINE). 1.

WATERWORKS — Rating — Indirectly productive portion of undertaking — Annual value — Interest on cost of land and buildings—Rate of interest —Added value in respect of special fitness of land for purposes of undertaking - - - - - - **337**
See RATES. 2.

WESTERN AUSTRALIA—Laws of - - **281**
See INSURANCE (MARINE). 1.

WILL—Pecuniary legacy—Covenant to settle land — Trust — Satisfaction — Specific performance—Election — Appeal from Ontario - - - - - - **266**
See ELECTION.

WORDS :—"Salary or income." HOLLINSHEAD *v.* HAZLETON - - - **H. L. (I.) [1916] A. C. 428**

WORKMEN'S COMPENSATION — *Accident arising out of Employment—Risk not incidental to Employment—Prohibited Act—Sphere of Employment—Workmen's Compensation Act*, 1906 (6 *Edw. 7, c.* 58), *s.* 1, *sub-s.* 1.

A workman employed as a shunter upon his employers' private railway was seriously and permanently injured by falling from the buffer of a wagon upon which he was improperly riding. His duty when wagons were being moved was to walk in front of them and keep a look-out, and a notice to that effect was posted on the employers' engine-shed. On the occasion of the accident, at the conclusion of some shunting operations, four wagons were being pushed by an engine towards the engine-shed when the workman, instead of walking in front of the train, climbed upon the buffer of the leading wagon and sat there till he fell and was run over. Upon a claim for compensation under the Workmen's Compensation Act, 1906, the county court judge found that the accident arose in the course of and out of the employment :—

Held by Lord Atkinson, Lord Shaw of Dunfermline, and Lord Wrenbury, Earl Loreburn and Lord Parmoor dissenting, that the man, in sitting on the buffer, was acting outside the

WORKMEN'S COMPENSATION—*continued.*

sphere of his employment, and that therefore the accident did not arise out of his employment.

Barnes v. *Nunnery Colliery Co.* [1912] A. C. 44 and *Plumb* v. *Cobden Flour Mills Co.* [1914] A. C. 62 applied.

Per Lord Atkinson: An arbitrator ought to distinguish clearly between his rulings on law and on fact, and cannot by finding in the words of the statute secure for a finding on a pure question of law, or on a question of mixed law and fact, that unassailability which belongs only to finding on a question of pure fact.

Decision of the Court of Appeal [1915] 2 K. B. 81 affirmed. HERBERT *v.* SAMUEL FOX & Co. - - - - - - **H. L. (E.) 405**

2. —— *Accident arising out of Employment—Seaman—Drinking Poison by Mistake for Water—Workmen's Compensation Act*, 1906 (6 *Edw.* 7, *c.* 58), *s.* 1, *sub-s.* 1.

A seaman on board a ship, which was in harbour in a hot climate, by mistake drank from a tin which he thought contained water a solution of soda and was badly burnt. The solution had been put into the tin by its owner, the boatswain, to clean it. It was the practice of the crew to carry the water obtained from the ship's pump in tins to a cool place and partake of it as required. This practice was sanctioned by the officers, but was not done by their orders. It was quite common for one man to drink water from another man's tin. The seaman found the tin in question in a place where there was sometimes a draught of air through the hawse holes.

Upon a claim for compensation under the Workmen's Compensation Act the sheriff-substitute found that the accident arose out of and in the course of the man's employment:—

WORKMEN'S COMPENSATION—*continued.*

Held, that the risk of drinking drugged water out of a tin belonging to another member of the crew was not shown to be reasonably incidental to the seaman's employment, and that there was no evidence to support the finding of the sheriff-substitute.

Observations by Lord Atkinson on the duty of the arbitrator to distinguish clearly between rulings on fact and rulings on law.

Decision of the Second Division of the Court of Session in Scotland, 1915 S. C. 867, reversed. HUTCHISON (J. & P.) *v.* M'KINNON **H. L. (Sc.) 471**

3. —— *Accident arising out of Employment—Seaman—Unexplained Drowning—Workmen's Compensation Act*, 1906 (6 *Edw.* 7, *c.* 58), *s.* 1, *sub-s.* 1.

A seaman was chief engineer on a steamship and was responsible for the working of all the machinery in the ship. He was troubled because there was something wrong with the propeller. On the evening before the ship arrived in port he told the steward to call him before his usual hour and bring him tea. This was done; he got up about 5.40, dressed in his working clothes, and was last seen going to the stern of the ship. His watch would not have begun till 8 o'clock:—

Held, that there was evidence to support the inference of the county court judge that he went to the stern to look at the propeller and his finding that his death was caused by accident arising out of and in the course of his employment within the meaning of the Workmen's Compensation Act, 1906.

Decision of the Court of Appeal [1915] 3 K. B. 344 affirmed. SERBINO S.S. (OWNERS) *v.* PROCTOR - - - - **H. L. (E.) 464**

BIBL... LONDEN... UNIV...

BRADBURY, AGNEW, & CO. LD., PRINTERS, LONDON AND TONBRIDGE.